EDITOR'S NOTE

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No. 03-6539

IN THE SUPREME COURT OF THE

Supreme Court, U.S.
FILED
SEP 22 2003
OFFICE OF THE CLERK

UNITED STATES

October term, 2003

ORIGINAL

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Jay Shawn Johnson asks leave to file the accompanying petition for writ of certiorari without prepayment of costs, and to proceed in forma pauperis. Petitioner has continuously been granted leave to so proceed. He has been represented by court-appointed counsel at the trial court (by the local public defender's office) and on appeal (by the undersigned). Petitioner has been continuously imprisoned on this case since February, 1996. Petitioner's affidavit in support of this motion is attached hereto.

Dated: September 18, 2003

STEPHEN B. BEDRICK*
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612
(510) 452-1900

*Counsel of record for Petitioner

No. 03 - ____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2003

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Jay Shawn Johnson, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that my responses to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true:

1. Are you presently employed? Yes. ___ No. V

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

---

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

I dont recall it was 1 and a half years ago

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes. ___ No. V

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

---

3. Do you own any cash or checking or savings account (include any funds in prison accounts)? Yes. ___ No. V

a. If the answer is yes, state the total value of the items owned.

---

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes. ___ No. V

a. If the answer is yes, describe the property and state its approximate value.

---

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I declare under penalty of perjury that the foregoing is true and correct.

Executed on Sept 9, 2003, at Vacaville, California.

/s/ Jay Shawn Johnson
JAY SHAWN JOHNSON

No. 03 - _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2003

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

I, Stephen B. Bedrick, a member of the Bar of this Court, hereby certify that on September 22, 2003 a copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to: Seth Schalit, Deputy Attorney General, State of California, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102; District Attorney, Contra Costa Co. Courthouse, 725 Court Street, P. O. Box 760, Martinez, CA 94553; Clerk, California Supreme Court, 350 McAllister Street, San Francisco, California 94102; Clerk, California Court of Appeal, First Appellate District, Division Two, 350 McAllister Street, San Francisco, California 94102; Clerk, Superior Court, Contra Costa County, P. O. Box 911, Martinez, CA 94553; Ana Ramirez Palmer, Warden, California [redacted] P. O. Box 2000, Vacaville, CA 95696; Mr. [redacted] P. O. Box 4000, [redacted] ve been served.

[redacted]

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No. 03 - _____

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2003

Supreme Court, U.S.
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JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

STEPHEN B. BEDRICK*
Attorney at Law
1970 Broadway, Suite 1200
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*Counsel of record for Petitioner

QUESTIONS PRESENTED

(1) Did the California Supreme Court violate the rule of Batson v. Kentucky, 476 U.S. 79 (1986) and the equal protection clause when it declared that the threshold for a prima facie case of racial discrimination in jury selection is proof that it is "more likely than not" that discrimination occurred, which test presents a much higher and more difficult threshold to reach than the standard established by this Court in Batson, namely, that a prima facie case is shown when there is an "inference" of discrimination?

(2) In a criminal case where the prosecutor peremptorily challenged all three black prospective jurors, leaving Petitioner, a black man, to be tried by a jury with no black jurors, did the California Supreme Court violate Batson when it held that the challenges to all three black jurors did not present even an inference of racial discrimination, which is necessary to establish a prima facie case?

(3) Did the California Supreme Court violate the Constitution when it refused to apply comparative juror analysis – namely, comparing answers given on voir dire by minority jurors who were challenged with the answers given to the same questions by white jurors who were accepted – in determining whether the claimed reasons for challenging the minority jurors were pretextual?

(4) Is not this Court's recent opinion in Miller-El v. Cockrell, 537 U.S. 322, 154 L.Ed.2d 931, 123 S.Ct. 1029 (2003), which expressly approves comparative juror analysis, retroactively applicable to a case on direct appeal, pursuant to Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649 (1987), or, instead, is the state court free to ignore Miller-El, and to refuse to apply comparative juror analysis, and to refuse to determine if claimed reasons for challenges to minority jurors are pretextual?

LIST OF PARTIES

Defendant JAY SHAWN JOHNSON

STATE OF CALIFORNIA

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No. 03 - _____

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 2003

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

Petitioner JAY SHAWN JOHNSON respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of California, entered on June 30, 2003.

OPINION BELOW

The Supreme Court for the State of California issued its published opinion on June 30, 2003, People v. Johnson (2003) 30 Cal.4th 1302 [1 Cal.Rptr.3d 1, 71 P.3d 270] (copy attached as Appendix A).

JURISDICTION

Subject matter jurisdiction arises here under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the equal protection clauses of the 6th and 14th Amendments to the United States Constitution. In relevant part, the Sixth Amendment guarantees the "equal protection of the laws." The Fourteenth Amendment provides: "Nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND OF THE FACTS

A. Facts about the Homicide

Petitioner Jay Shawn Johnson was convicted in Contra Costa County, California state court on December 11, 1998 of one count of second degree murder, California Penal Code §187, and was sentenced to a prison term of 15 years to life.[1]

Petitioner, an African-American (black) man, caused the death of Janika Price, the 18-month old daughter of his white girlfriend and another man. The issue at trial was whether the homicide was accidental or malicious.

The prosecutor's theory was that Petitioner maliciously punched or kicked the child to death while they were in the bedroom.

The defense theory was that the death was accidental. Petitioner admitted causing the child's death. He bumped into the victim child. She started wheezing and had trouble breathing. The child's mother took her into the next room. Petitioner gave the child some water. She drank it. When the child began gasping for breath, Petitioner attempted to perform cardio-pulmonary resuscitation (CPR) on the child by striking her hard on the chest, but he struck much too hard. Petitioner defended on the ground that his negligent administration of CPR was the cause of death.

B. The Legal Issue as Presented in the State Courts

At Petitioner's trial, the prosecution peremptorily challenged all three black jurors who had been passed for cause, leaving Petitioner, a black man, to be tried by a jury with no black persons on it, in a case which had clear racial overtones.

---

[1]This conviction was after a third trial. The first trial terminated in a mistrial after the prosecutor failed to disclose that his main witness had substantially changed her story from that given in earlier testimony. (Aug. RT first trial 510) The second trial resulted in a conviction, but that conviction was overturned by the California Court of Appeal in case #A076360, unpublished opinion filed July 27, 1998, on the grounds that instructional errors allowed the jury to convict Petitioner on a legally improper theory.

The prosecutor did not questions any of the three black jurors before he struck them. He did not give reasons for his challenges. The trial judge speculated as to reasons for challenges to two of these three jurors, but said nothing about the third. The trial judge acknowledged that one of these juror's "answers tend[ed] to favor the prosecution."

In denying Petitioner's Batson motion, the trial court employed California's "strong likelihood" standard, stating "there's not been shown a strong likelihood that the exercise of peremptory challenges were based upon a group rather than an individual basis." (Aug. RT 223, emphasis added) Nonetheless, the trial court did state that this set of challenges was "very close" to presenting a prima facie case. (Id.)

Petitioner appealed to the California Court of Appeal, First District, Division 2. The Court of Appeal reversed his conviction by a vote of 2-1, holding that the trial court had erred in failing to find a prima facie case of racial discrimination in jury selection in violation of Batson v. Kentucky, 476 U.S. 79 (1986) and in violation of the California equivalent, People v. Wheeler (1979) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748]. (The California Court of Appeal's opinion, formerly published as People v. Johnson (2001) 88 Cal.App.4th 318 [105 Cal.Rptr.2d 727] is attached as Appendix B.)

The Court of Appeal found a prima facie case of discrimination by reasoning as follows: (i) First, on the numbers: the prosecutor peremptorily challenged all three black potential jurors, leaving no black people on the jury. (ii) Second, the Court of Appeal ruled that the trial court erred when it stated that the standard for a prima facie case was a "strong likelihood" of discrimination. Instead, the correct standard for a prima facie case is the less stringent standard of an "inference" of discrimination under Batson. Because the trial court applied an incorrect legal standard, its ruling on this issue was not entitled to deference, and the Court of Appeal could review the issue de novo. (iii) Third, the Court of Appeal determined that the claimed reasons why the prosecutor challenged two of the three black jurors were pretextual, because those same reasons applied to several white jurors whom the prosecutor accepted. People v. Johnson, 88 Cal.App.4th at 332-337. (Appendix B) Accordingly, the California Court of Appeal found a prima facie case

of racial discrimination as to two of the three challenged black jurors, Clodette Turner and Sara Edwards, and reversed Petitioner's conviction under Batson.

The prosecution appealed to the California Supreme Court. On June 30, 2003, that court reversed the Court of Appeal by a vote of 5-2 and affirmed the conviction. That decision is based on two legal conclusions which Petitioner asserts are squarely inconsistent with this Court's rulings in Batson v. Kentucky, supra, and in Miller-El v. Cockrell, 573 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). (See Appendix A):

(1) According to the California Supreme Court, a prima facie case of racial discrimination in jury selection is not established unless the objector proves that it was "more likely than not" that the challenge was made for a discriminatory purpose. People v. Johnson, 30 Cal.4th at 1306. Thus, California's highest court held that the trial court was correct in applying the equivalent "strong likelihood" standard, and that the Court of Appeal was wrong in applying what it believed was the easier-to-meet federal "inference" standard, notwithstanding the holding in Batson, 476 U.S. at 92-93, that an "inference" of discrimination is sufficient to establish a prima facie case. Because the state Supreme Court held that trial court used the correct standard, it deferred to the trial court's ruling, refusing to find a prima facie case.

Further, according to the California Supreme Court, the fact that the prosecutor challenged all three black jurors did not satisfy that court's "more likely than not" test for a prima facie case. Instead, it concluded that the prosecutor's exclusion of all three black jurors was no more than "happenstance." Id., 30 Cal.4th at 1327.

(2) According to the California Supreme Court, an appellate court in California may not apply comparative juror analysis, namely, comparing answers given on voir dire by minority jurors who were challenged, with answers to similar questions given by white jurors who were not challenged, to determine if the prosecutor's arguable reliance on the minority jurors' answers in challenging them was pretextual. Instead, a California court only examines answers given by minority jurors to determine if the prosecutor's arguable reliance upon any such answer would be race-neutral on its face. According to that

court's precedents, an appellate court is required to ignore, and may not examine, answers given by accepted white jurors to determine if they gave the same answers as minority jurors who were perempted, or to determine whether claimed reliance on such answers by minority jurors would be pretextual. Id., 30 Cal.4th at 1318-1325.

The California Supreme Court thus refused to apply comparative juror analysis, even though such analysis was applied in this Court's recent opinion in Miller-El v. Cockrell, 537 U.S. 322, 123 S.Ct. at 1036-1037, and even though such analysis is applied by all the federal appellate courts. The California Supreme Court gave two reasons for this refusal. First, California has disallowed comparative juror analysis for the last 15 years. People v. (James) Johnson (1989) 47 Cal.3d 1194, 1216-1221 [255 Cal.Rptr 569]; People v. Montiel (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 885 P.2d 1277]; People v. Arias (1996) 13 Cal.4th 92, 136, n. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980]; People v. (Jay Shawn) Johnson, supra. Second, that court held that, because comparative juror analysis was not used at trial when this case was tried,[2] it should not be utilized on appeal, either. This conclusion effectively treats this Court's decision in Miller-El v. Cockrell, which utilizes comparative juror analysis as a matter of course, as not retroactive, notwithstanding the rule of Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649 (1987) that decisions of this Court are retroactive to cases pending on direct appeal, which the instant case was. People v. Johnson, supra, 30 Cal.4th at 1321-1322.

Two of the seven California Supreme Court justices dissented. They would have reversed, because, under the proper legal standard, namely, Batson's "inference" standard, a prima facie case of discrimination should have been found, because the prosecutor perempted all three black jurors, and because, as to at least two of those jurors, there is nothing on the record showing why they would not be acceptable jurors. People v. Johnson, supra, 30 Cal.4th at 1333, 1340, 1341 (Kennard, J. dissenting)

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[2]Comparative juror analysis was not used at trial because California law did not allow it. People v. Arias, supra, 13 Cal.4th at 136.

REASONS FOR GRANTING CERTIORARI

The issue of when peremptory challenges to jurors must be prohibited, because they are based on race, appears on this Court's docket every few years, and appears on appellate court dockets by the hundreds.

This Court has striven to establish a fine balance between a party's rights to exercise peremptory challenges and potential jurors' equal protection rights not to be excluded because of their race. Nonetheless, some state courts, especially those in California, have been resistant, indeed obdurate, in their refusal to follow the principles stated by this Court in Batson v. Kentucky, 476 U.S. 79 (1986), notwithstanding clear evidence, or at least prima facie evidence, of racial discrimination in jury selection.

This case presents two issues on which California has sharply deviated from the principles established by this Court in Batson and its progeny. Unless this Court corrects the current decision, future California decisions will continue to violate Batson.

First, the California Supreme Court has refused to follow the holding by this Court in Batson that a prima facie case of discrimination arises whenever there is an "inference" of discrimination. Instead, the California Supreme Court erected in this case a much higher barrier before a prosecutor will be required to explain the reasons for his challenges. That court held here that an objecting party must show that it is "more likely than not" that a challenge is racially-based before even a prima facie case of discrimination is presented, and before the prosecutor must state his reasons.

This test creates a much higher threshold for a prima facie case than Batson's "inference" standard. This test will result in a reduced level of scrutiny of race-based challenges to minority jurors, in violation of Batson. This test will severely weaken the 14th Amendment equal protection rights of minority citizens to serve on juries.

Second, the California Supreme Court refused here to utilize "comparative juror analysis" in deciding whether claimed reasons for the prosecutor's challenges to minority jurors were pretextual. Under comparative juror analysis, after a reason is stated, or suggested, for a prosecutor's challenge to a minority juror (e.g., an answer on voir dire), a

court examines whether similar reasons apply to, or whether similar answers were given by, white jurors who have been accepted. If so, that constitutes strong evidence the claimed reason for the challenge to the minority juror is pretextual. Miller-El v. Cockrell, supra, 123 S.Ct. at 1043-1044. In Miller-El, this Court made clear that comparative juror analysis is employed by both trial and appellate courts.

However, California – alone among 50 states and 12 federal circuits – has obdurately refused to apply comparative juror analysis, either at trial, or on appeal. In California a court may only examine the claimed or hypothesized reasons for challenging minority jurors to determine if they are race-neutral on their face. It may not compare answers given by accepted white jurors to determine whether the claimed or hypothesized reasons for the challenges to minority jurors are pretextual.[3]

Even after this Court's recent decision in Miller-El, California still refuses to apply comparative juror analysis. It refused to apply it here on the theory that, because comparative juror analysis was not employed at trial (because, when this case was tried, comparative juror analysis was not allowed under California law at any stage), it should not be utilized on appeal, either. This ruling effectively holds Miller-El non-retroactive.

California's attempt to evade Miller-El should not be countenanced. Instead, this Court's traditional rule of retroactivity should apply, namely, that a decision of this Court is retroactive to all cases on direct appeal, as this case was. Griffith v. Kentucky, 479 U.S. 314 (1987). Thus, this Court should grant certiorari, and apply comparative juror analysis to this case, or, alternatively, it should grant, vacate, and remand (GVR), and direct the state court to apply comparative juror analysis in the first instance.[4]

---

[3]In the instant case, because no prima facie case was found, the prosecutor never stated his reasons. Instead, the state Attorney General's office hypothesized or suggested reasons which the prosecutor might have used.

[4]When the California Court of Appeal applied comparative juror analysis, it found a prima facie case of discrimination as to two of the challenged minority jurors, and reversed Petitioner's conviction on that ground. (See opinion, Appendix B)

I.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE CALIFORNIA SUPREME COURT FROM IMPROPERLY ELEVATING THE THRESHOLD FOR A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN JURY SELECTION FROM A SHOWING OF AN "INFERENCE" OF DISCRIMINATION, AS PROVIDED IN BATSON, TO A SHOWING THAT DISCRIMINATION IS "MORE LIKELY THAN NOT"

A. California Has Historically Refused to Comply with Batson

In Batson v. Kentucky this Court held that the threshold for a prima facie case of racial discrimination in jury selection is an "inference" of discrimination. When that "inference" threshold is reached, a prima facie case is found, and the challenging party will be required to state a reason for his challenge. The trial court then determines (a) if that reason is race-neutral on its face, and (b) whether the challenger's intent, in the context of the case as a whole, is race-neutral. Purkett v. Elem, 514 U.S. 765, 767, 131 L.Ed.2d 834 (1995). If the prosecutor is not discriminating, it should take but a minute for him to state his race-neutral reason, and then the case moves forward.

California refuses to follow this Court's rule in Batson that a prima facie case of discrimination arises if there is an "inference" of discrimination. From 1990 to 2001, the California Supreme Court held that a prima facie case was not presented unless there was a "strong likelihood" of racial discrimination. People v. Sanders (1990) 51 Cal.3d 471, 500-501 [273 Cal.Rptr 537, 797 P.2d 561]; People v. Howard (1992) 1 Cal.4th 1132, 1154-1156 [5 Cal.Rptr.2d 268, 824 P.2d 1315]; People v. Crittenden (1994) 9 Cal.4th 83, 117-119 [36 Cal.Rptr.2d 474, 885 P.2d 887]. The trial judge explicitly applied the "strong likelihood" test here.

The California Supreme Court made clear in this line of cases that the "strong likelihood" test presented a substantially higher threshold for establishing a prima facie case than the Batson "inference" test. For example, in People v. Sanders, supra, 51 Cal.3d at 500-501, where the prosecutor peremptorily challenged all four prospective Hispanic jurors, the California Supreme Court denied the defendant's claim of a prima

facie case, holding that although the defendant had presented an "inference" of discrimination, he had not presented a prima facie case, because he had not presented a "strong likelihood" of discrimination:

> Although the removal of all members of a certain group may give rise to an inference of impropriety (Wheeler, supra, 22 Cal.3d at 280), we cannot say this factor was dispositive on the record . . . [T]he trial court . . held defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges was based on group bias. (emphasis added)

Thus, that court held in Sanders that, even though the defendant had established an "inference" of discrimination, he had not established a "strong likelihood" of it.

Other California decisions are similar. For example, in People v. Howard, supra, 1 Cal.4th at 1154-1156, the prosecutor challenged the only two prospective black jurors. In affirming, the California Supreme Court held "although the removal of all members of a certain group may give rise to an inference of impropriety, especially when the defendant belongs to the same group, the inference is not conclusive." In People v. Crittenden, supra, 9 Cal.4th at 117-119, the prosecutor challenged the one and only prospective black juror. That court once again held that the standard establishing a prima facie case was the "strong likelihood" standard, not the "inference" standard.[5]

This "strong likelihood" standard made it substantially harder to establish a prima facie case of discrimination than under Batson. This standard substantially reduced the amount of scrutiny given to peremptory challenges of minority jurors, because its unduly elevated threshold made it harder for an objector to require the challenger to state his

[5]The California Courts of Appeal regularly draw the same distinction. For example, in People v. Buckley (1997) 53 Cal.App.3d 658, 664, [61 Cal.Rptr.2d 860], a case involving the very same trial judge as in the instant case, the Court of Appeal ruled that the threshold for a prima facie case of a Wheeler violation was a "strong likelihood," and not just an "inference," of group bias. The Buckley court explicitly stated: "the strong likelihood phrase . . . conveys the clear message that the test is not an easy one (a message we take to heart in the present case). . . . " (Id. at fn. 17)

reasons for his challenges. Thus, the overly-elevated threshold made it easier for a challenger to get away with discrimination.

B. The California Standard Improperly Conflicts with the Federal Standard, as Enunciated by the Ninth Circuit

The Ninth Circuit has attempted to resolve the conflict between this Court's correct standard of scrutiny in Batson and California's watered-down standard of scrutiny. However, the California Supreme Court has refused to listen.

The Ninth Circuit has unanimously held in at least four opinions, decided by at least 11 different judges, that the California standard for a prima facie case presents an unduly-elevated threshold, and thus conflicts with this Court's test under Batson. Because California uses a standard that conflicts with Batson, decisions on this issue by California courts do not warrant deference. Instead, appellate de novo review is applied. Wade v. Terhune, 202 F.2d 1190, 1195 (9th Cir. 2000); Cooperwood v. Cambra, 245 F.3d 1042, 1046 (9th Cir. 2001) ; Fernandez v. Roe, 286 F.3d 1073, 1076 (9th Cir. 2002); Lewis v. Lewis, 321 F.3d 824, 827 (9th Cir. 2003).[6]

For example, the Ninth Circuit held in Wade v. Terhune, supra, 212 F.2d at 1197:

> Batson is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the Wheeler "strong likelihood" test in determining whether a prima facie case has been established.
>
> In our view, the Wheeler "strong likelihood" test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous Batson "inference" test. Indeed, when the California Court of Appeal resolved the direct appeal in the case now before us, it followed the literal language of Wheeler and characterized its test for a prima facie case as "not easy." Buckley, 53 Cal.App.4th at 663 n. 17, 61 Cal.Rptr.2d 860. It wrote,

[6]The Eleventh Circuit is in agreement. In King v. Moore, 196 F.3d 1327, 1334 (11th Cir. 1997) it held that Florida's former "strong likelihood" standard was too high, because Batson merely requires an "inference of discrimination.

> "The 'strong likelihood' phrase conveys the clear message that the test is not an easy one (a message we take to heart in the present case) . . . ." Id. The United States Supreme Court has explained that the Batson framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure. See Georgia v. McCollum, 505 U.S. 42, 47, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992) . . . . We therefore conclude that California courts in following the "strong likelihood" language of Wheeler are not applying the correct legal standard for a prima facie case under Batson.

Notwithstanding this growing line of Ninth Circuit authority, the California Supreme Court has remained obdurate. Although it has twice relabeled its prima facie standard in an effort to pass it off as compliant with Batson, it has never changed the level of that standard, and thus it has never cured the defects identified by the Ninth Circuit in Wade v. Terhune, Cooperwood v. Cambra, Fernandez v. Roe, and Lewis v. Lewis.

First, in People v. Box (2000) 23 Cal.4th 1153, 1168, n. 7 [99 Cal.Rptr.2d 69, 5 P.3d 130], the California Supreme Court, responding to the Ninth Circuit's criticism in Wade v. Terhune, claimed that its "strong likelihood" standard was exactly the same as this Court's "inference" standard, notwithstanding the explicit California rulings in prior cases that its "strong likelihood" threshold required a showing of much more than an inference. See, e.g., People v. Sanders, supra; People v. Buckley, supra.

The Ninth Circuit rejected that reformulation as revisionist. It refused to accept California's claim in Box that its "strong likelihood" test complied with Batson, or that California's "strong likelihood" test and this Court's "inference" test in Batson were the same. Instead, the Ninth Circuit held that the California standard does not comply with the Constitution, because for many years it provided "a lower standard of scrutiny to peremptory strikes than the Constitution permits." Cooperwood v. Cambra, supra, 235 F.3d at 1047. Accord: Fernandez v. Roe, supra; Lewis v. Lewis, supra.

Having failed to persuade the Ninth Circuit with its Box reformulation, the California Supreme Court made still another effort at relabeling. It claimed in Johnson

that what it really meant by the "strong likelihood" test for a prima facie case was the "more likely than not" test. People v. Johnson, 30 Cal.4th at 1306. Thus, the California Supreme Court held here that a defendant must show that it is "more likely than not" that a peremptory challenge was made for a discriminatory reason, before a prima facie case is established. That court explained that its new "more likely than not" test was really the same as its old "strong likelihood" test. However, because the old "strong likelihood" test does not satisfy the Constitution, Wade v. Terhune, supra, Fernandez v. Roe, supra, the new test, claimed by California to be equivalent, does not satisfy it, either.

C. The Current California "More Likely than Not" Standard Violates Batson

In Batson v. Kentucky, 476 at 97, this Court explained how an objector could present a prima facie case of a discriminatory challenge.

> . . . the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. . . . In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. (emphasis added)

In Purkett v. Elem, 514 U.S. 765, 767 this Court clarified the three-step test for determining when peremptory challenges violate the equal protection clause:

> [O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination. *Hernandez v. New York*, 500 U.S. 352, 358-359 (1991) (plurality opinion) id., at 375 (O'Connor, J., concurring in judgment); ***Batson, supra,*** at 96-98.

When California requires the defendant to prove at the first step of this process that it was "more likely than not" that the prosecutor acted with discriminatory intent, that violates the Purkett v. Elem three-step test. Under Purkett v. Elem, the defendant does not need to reach this level of proof until step three. Accordingly, the California test is defective, because it short-circuits the required three-step process. Just as this Court reversed in Purkett v. Elem because the lower court improperly combined steps one and two of this procedure, this Court should grant certiorari and reverse because the California test improperly conflates steps one and three.

Further, the Batson formulation makes clear that the "inference" needed to present a prima facie case is a permissive inference, and not, as the California court held here, a "legally mandatory [but] rebuttable presumption." Id., 30 Cal.4th at 1315.

Wigmore explains that the most common method of establishing a prima facie case is by presenting a permissive inference. "[T]he more common meaning of prima facie case applies 'where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case." 9 Wigmore, Evidence (Chadbourn rev.ed. 1981) §2494, p. 379.

At no point in Batson, or in any case that has followed it, has this Court suggested, or intimated, that to establish a prima facie case, an objector must prove any more than a permissive inference, or that he must prove a conclusive or "legally mandatory" inference, namely, an inference which is so strong that it is "more likely than not."

The federal Courts of Appeals hold that the inference called for in Batson is permissive, not conclusive. See, e.g., Tankleff v. Senkowski, 135 F.3d 235, 249 (2d. Cir. 1998); Simmons v. Beyer, 44 F.3d 1160, 1167 (3d Cir. 1995); Mahaffey v. Page, 162 F.3d 481, 485 (7th Cir. 1998) (prima facie case arises from "pattern" of challenges); United States v. Johnson, 873 F.2d 1137, 1139 (8th Cir. 1989); Wade v. Terhune, supra (9th Cir. 2000); United States v. Chalan, 812 F.2d 1302, 1312 (10th Cir. 1989) (prima facie case arises when there is a "substantial risk" that the government excluded the jurors

because of their race): Central Alabama Fair Housing v. Lowder Realty, 236 F.3d 629, 636-637 (11th Cir. 2000). California's claim to the contrary needs to be corrected.[7]

The California Supreme Court asserted in Johnson, 30 Cal.4th at 1314-1315, that the quantum of proof needed for a prima facie case of racial discrimination in jury selection is the same quantum of proof as needed for a prima facie case in a Title VII employment discrimination case, namely, proof by a preponderance of the evidence (i.e., more likely than not). See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253-254 (1981), where this Court held:

> The burden of establishing a prima facie case of disparate treatment *is not onerous*. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.

That assertion by the California court is totally wrong. The quantum of proof needed to present a prima facie case in these two situations is totally different, because the effect of a prima facie case is totally different in each.

In employment cases, if the plaintiff employee presents a prima facie case, two things happen. First, the employee shifts the burden of production of evidence to the defendant employer. Second, if the defendant employer does not adequately rebut the prima facie case, then the employee is automatically entitled to judgment in his favor. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-509, 125 L.Ed.2d 407 (1993).

Under such circumstances, the quantum of proof needed to establish a prima facie case in employment cases is a preponderance of the evidence. This is true, (a) because

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[7]The California Supreme Court claimed in its Johnson opinion that decisions from other state courts supported its position that the subject "inference" must reach the level of "more likely than not." People v. Johnson, supra, 30 Cal.4th at 1316. However, that court only cited cases from two states. Presumably, it failed to find support from the other 48 states. In any event, the dissent in Johnson dispelled reliance on either of these two states. People v. Johnson, supra, 30 Cal.4th at 1335-1336 (Kennard, J. dissenting). Thus, the California Supreme Court has been unable to locate a single court, either state or federal, which agrees with its attempt to water down Batson on this point.

the quantum of proof which establishes a prima facie case under Title VII must be sufficient to allow the plaintiff to win a judgment, and (b) because winning a judgment necessarily requires proof by a preponderance of the evidence.

However, the situation is totally different in a jury challenge dispute. Under Purkett v. Elem, supra, the burden of proof never shifts. It always belongs to the objecting defendant. When a defendant presents a prima facie case, that merely means that he has satisfied his burden of producing evidence, and that the prosecutor is required to state a reason for his challenge. At no point does the objecting defendant need to produce enough evidence to win a judgment.

Further, and unlike under Title VII, when a defendant presents a prima facie case under Batson, that does not guarantee that he wins his case, or even that he wins a juror challenge. In Batson cases, even after presenting a prima facie case, the defendant still retains the burden to prove the prosecutor's intent. Purkett v. Elem, supra, 514 U.S. at 768 explicitly contrasts the partial burden shifting in Batson cases from the full burden shifting used in employment cases such as St. Mary's Honor Center v. Hicks.

As explained in Purkett v. Elem, 514 U.S. at 768, "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." Because that burden never shifts, the strength of the prima facie case needed to evoke an explanation does not have to be high enough to shift the burden of persuasion. Instead, the prima facie case need only be strong enough to raise on "inference" of discrimination, Batson, supra, so as to shift the burden of production of evidence. As shown above, this inference need only be permissive.

For all these reasons, California stands alone in the nation claiming that the threshold for a prima facie case is so elevated that it requires proof that discrimination is "more likely than not." That court is wrong, because such conclusion violates the rules of Batson and Purkett v. Elem. Accordingly, certiorari is warranted.

II.

CERTIORARI SHOULD BE GRANTED BECAUSE THE CALIFORNIA SUPREME COURT VIOLATED BATSON WHEN IT REFUSED TO FIND A PRIMA FACIE CASE OF RACIAL DISCRIMINATION AFTER THE PROSECUTOR PEREMPTORILY CHALLENGED ALL THREE PROSPECTIVE JURORS OF THE DEFENDANT'S RACE

In the instant case the prosecutor peremptorily challenged all three prospective black jurors, leaving no blacks on the jury, in a case involving a black defendant[8] charged with killing his white girlfriend's's child.[9] In addition, the trial judge failed to find any race-neutral reason to support the challenge to one juror, Clodette Turner, and the trial judge stated as to another juror, Sara Edwards, that her "answers tend [ed] lean in favor of the prosecution." Nonetheless, the trial court and the state Supreme Court refused to find a prima facie case of a Batson violation.

This Court has long recognized that the "total . . . exclusion" of jurors of a minority race is particularly suspect. Batson, supra, 476 U.S. at 93.

The federal circuit courts are unanimous that a prima facie case of discrimination is presented when the prosecutor strikes all two or more members of the defendant's racial group from the jury, leaving no jurors remaining from the defendant's racial group. Tankleff v. Senkowski, 135 F.3d 235, 249 (2d Cir. 1998) (strikes of all three blacks); Simmons v. Beyer, 44 F.3d 1160, 1167 (3d Cir. 1995) (strikes of all three blacks); Splunge v. Clark, 960 F.2d 705, 707 (7th Cir. 1992) (strikes of all two blacks); Mahaffey v. Page, supra, 162 F.3d at 485; McClain v. Prunty, 217 F.3d 1209 (9th Cir. 2000) (strikes

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[8]A defendant need not be of the same racial group as the challenged jurors to present a Batson claim. Powers v. Ohio, 499 U.S. 400, 113 L.Ed.2d 411 (1991). However, the fact that, as here, the defendant is of the same race as the challenged jurors strengthens the defendant's prima facie claim, because this fact weakens any argument that the challenges to jurors of the defendant's ethnicity were mere "happenstance." Batson, supra, 476 U.S. at 87; Powers, supra, 499 U.S. at 416.

[9]The fact that a case has racial overtones, as this one does, strengthens the argument that the challenges to jurors of the defendant's race were not mere happenstance. See, e.g., Mahaffey v. Page, 162 F.3d 481, 485 (7th Cir. 1998).

of all three black jurors); Stubbs v. Gomez, 189 F.3d 1099 (9th Cir. 1999) (strikes of all three blacks); United States v. Chinchilla, 874 F.2d 695, 698 (9th Cir. 1989) (prosecutor struck all two Hispanics); United States v. Chalan, 812 F.2d 1302, 1312 (10th Cir. 1989) (prima facie case where government struck three of four Indians for cause, and then struck last Indian peremptorily; "If all the jurors of a defendant's race are excluded from the jury, we belie/ve that there is a substantial risk that the government excluded the jurors because of their race.")

Thus, the circuit courts are unanimous that challenges to all three of the jurors of the defendant's race indisputably establishes at least an "inference" of discrimination, within the meaning of Batson, so as to establish a prima facie case. While a prima facie case could be established by less than three strikes (see, e.g., United States v. Chinchilla, supra; Splunge v. Clark, supra), there appears to be, at the minimum, an almost automatic "three-strikes-and-you're-out" rule, at least insofar as establishing a prima facie case and requiring the prosecutor to state his reasons for his challenges.[10] This de facto "three strikes" rule does not place an onerous burden on the prosecutor. If the prosecutor is not discriminating, it should take but a minute for him to state his race-neutral reason, and then the case moves forward.

The fact that California found that its "strong likelihood" or "more likely than not" threshold was not met when the prosecutor struck all three black jurors exemplifies how the unduly-elevated California threshold is far more difficult to reach than Batson's "inference" threshold.

Although the state Supreme Court, like the trial court, acknowledged that this case was "close," and the statistics were "troubling," it stated that the strikes to all three black jurors were "perhaps more explainable by happenstance." 30 Cal.4th at 1327.

In Miller-El this Court also discussed whether the exclusion of a large number of minority jurors might be the result of "happenstance," 123 S.Ct. at 1042:

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[10]In Miller-El v. Cockrell, 537 U.S. 322, ____, 123 S.Ct. 1029, 1042 (2003) this Court held that "statistical evidence alone" may be sufficient to establish a prima facie case.

> In this case, the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity.

This Court has the more realistic view of whether "happenstance" is likely to produce such disparities.

Accordingly, certiorari should be granted, because the refusal by the California Supreme Court to find a prima facie case of a Batson violation on these facts, especially after the state Court of Appeal did find a prima facie case, conflicts with the decisions of every federal circuit, and is wholly inconsistent with this Court's decisions in Batson and Miller-El.

III.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE CALIFORNIA SUPREME COURT FROM FLAUTING THE RULE, MOST RECENTLY ENUNCIATED IN MILLER-EL V. COCKRELL, THAT UNDER COMPARATIVE JUROR ANALYSIS, A PROSECUTOR'S SUPPOSED REASONS FOR CHALLENGING A MINORITY JUROR MAY BE DEEMED PRETEXTUAL, IF THOSE REASONS EQUALLY APPLY TO WHITE JURORS WHOM HE ACCEPTED

A. Comparative Juror Analysis Applies to Batson Cases

Under comparative juror analysis, after a reason is stated, or suggested, for a prosecutor's challenge to a minority juror (e.g., an answer to a question on voir dire),[11] a court examines whether similar reasons apply to, or whether similar answers were given by, white jurors who have been accepted. If so, that constitutes strong evidence the claimed reason for the challenge to the minority juror is pretextual. Miller-El v. Cockrell, supra, 537 U.S. ____, 123 S.Ct. at 1043-1044.

Comparative juror analysis has been uniformly applied in all 12 federal circuits ever since Batson. Caldwell v. Maloney, 159 F.3d 639, 653 (1st Cir. 1998); Jordan v. Lefevre, 206 F.3d 196, 201 (2d Cir. 2000); United States v. Alvarado, 923 F.2d 253, 256 (2nd Cir. 1991); Jones v. Ryan, 987 F.2d 960, 963 (3rd Cir. 1993); Howard v. Moore, 131 F.3d 399, 408 (4th Cir. 1997); Hicks v. Johnson, 186 F.3d 634, 637 (5th Cir. 1999); United States v. Hatchett, 918 F.2d 631, 636 (6th Cir. 1990); Mahaffey v. Page, 162 F.3d 481, 485-486 (7th Cir. 1998); Coulter v. Gilmore, 155 F.3d 912, 921 (7th Cir. 1998); Ford v. Norris, 67 F.3d 162, 168 (8th Cir. 1995); Devose v. Norris, 53 F.3d 201 (8th Cir. 1995); McClain v. Prunty, 217 F.3d 1209, 1215, 1222 (9th Cir. 2000); Turner v. Marshall (Turner II), 121 F.3d 1248, 1251-1252 (9th Cir. 1997); United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987); Hollingsworth v. Burton, 30 F.3d 109, 112 (11th

[11]In the instant case, because no prima facie case was found, the prosecutor never stated his reasons. Instead, the state Attorney General's office and the dissenting justice at the state Court of Appeal hypothesized or suggested reasons which the prosecutor might have used.

Cir. 1994); United States v. Wynn, 20 F.Supp.2d 7, 13-15 (D.D.C. 1997).

Comparative juror analysis is also the law of the land under Miller-El.

The comparison of how white workers and minority workers are treated is the essence of an employment discrimination case. As this Court held in Texas Dep't of Community Affairs v. Burdine, supra, 450 U.S. at 258, "it is the plaintiff's task to demonstrate that similarly situated employees were not treated equally." Accord: McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804, 36 L.Ed.2d 668 (1973): "Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races."

Batson cases explicitly rely upon these employment discrimination cases. Batson v. Kentucky, supra, 476 U.S. at 94, fn. 18; Purkett v. Elem, supra, 514 U.S. at 768-769. Thus, their elementary principle, namely, analyzing whether similar-situated white and minority persons were treated differently, equally applies in juror selection. Just as one cannot judge an employment discrimination case without determining whether the minority employee was treated differently than white employees, one cannot judge whether minority jurors were perempted because of their race unless one compares their answers and characteristics with those of the white jurors who were seated. Miller-El v. Cockrell, supra, 537 U.S. at ____, 123 S.Ct. at 1042-1044.

B. Certiorari Should Be Granted to Put an End to California's Refusal to Apply Comparative Juror Analysis Because Comparative Juror Analysis Is Employed by Every Other Court in the Nation

For close to 15 years the California Supreme Court has defiantly stood alone, among all the courts in the country, in refusing to apply comparative juror analysis when evaluating whether reasons given for challenges to minority jurors are pretextual. People v. (James) Johnson (1989) 47 Cal.3d 1194, 1216-1221; People v. Montiel (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 885 P.2d 1277]; People v. Arias (1996) 13 Cal.4th 92, 136, n. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980]; People v. (Jay Shawn) Johnson, supra.

California's refusal to employ comparative juror analysis is demonstrably wrong. Miller-El v. Cockrell, supra. Even before this Court's decision in Miller-El, every one of

the 12 federal circuits, as well as state courts everywhere, applied comparative juror analysis as a matter of course. (See p. 19, supra) Miller-El utilizes comparative juror analysis as if it were a routine and non-controversial method of evaluating evidence, which it is, everywhere except in California.

California claims that, because comparative juror analysis was not used or allowed at trial under state law when this case was tried, it should not be utilized on appeal, either. People v. Johnson, 30 Cal.4th at 1319-1321. This conclusion is wrong for several reasons:

(1) It is contrary to federal constitutional law. Miller-El v. Cockrell, supra.

(2) It is contrary to elementary principles of appellate review. When an appellate court reviews any case, it examines all the pertinent facts before the trial court. In a discrimination case, the pertinent facts include whether minority persons and similarly situated white persons were treated equally or unequally. See, e.g., McDonnell Douglas Corp. v. Green, supra. However, when an appellate court only looks at half the facts, as the California Supreme Court did here, when it deliberately refused to examine whether the claimed reasons for the challenges to the black jurors applied equally to the white jurors who were accepted, it abdicates its responsibility to conduct accurate plenary review.

(3) The state Supreme Court rejected comparative juror analysis on the theory that, while California supposedly allows comparative juror analysis to be raised at trial, it does not allow it to be raised for the first time on appeal. People v. Johnson, supra, 30 Cal.4th 1318-1320. This claim is thoroughly inaccurate. Ever since 1989 that court has barred comparative juror analysis from being used at any stage, including at trial. See, e.g., People v. Arias, supra, 13 Cal.4th at 136, n. 10, where that court held:

> Just as an appellate court will not compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. "[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparison mid-trial." (*People v. Johnson, supra*, 47 Cal.3d 1194, 1220.)

> Moreover, as we have indicated, such an analysis is largely beside the point, . . .

Further, in a case decided just two months after Johnson, that court continued to hold, totally contrary to Miller-El, that comparative juror analysis may not be employed at any time, including at trial. People v. Reynoso (2003) ____ Cal.4th ____ [3 Cal.Rptr.3d 769, 74 P.3d 852]. In People v. Reynoso, that court once again refused to apply comparative juror analysis, as it has obdurately refused to do for the last 15 years, holding it

> unreasonabl[e] [to] expect[ ] trial judges to make "detailed comparisons mid-trial" of a prosecutor's "stated reasons for challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor." (Id., 3 Cal.Rptr.3d at 863)

Thus, the suggestion in the instant Johnson case that comparative juror analysis would be employed on appeal in California, if only it had been utilized at trial, is not factually accurate. California categorically refused to apply comparative juror analysis at trial before this Johnson case, People v. Arias, supra, and California has categorically refused to apply comparative juror analysis at trial after this Johnson case. People v. Reynoso, supra. Because comparative juror analysis has been categorically prohibited at trial, any decision such as this, which purports to allow its use on appeal, if only it were used at trial, presents an impossible-to-satisfy "Catch-22."

For all these reasons, certiorari should be granted, to prevent California from continuing to evade the use of comparative juror analysis, as provided by Miller-El.

C. Certiorari Should Be Granted to Clarify That Miller-El Is Retroactive

By ignoring Miller-El, and by refusing to apply the standard appellate technique of comparative juror analysis, the California Supreme Court effectively treated this Court's decision in Miller-El as not retroactive. That treatment is wrong. Under the rule of Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649 (1987) decisions of this Court are retroactive to cases pending on direct appeal. Because the instant case was pending on direct appeal when Miller-El was decided, and because Miller-El employs comparative juror analysis as a matter of course, Miller-El's use of comparative juror analysis

retroactively applies to the instant case. Griffith v. Kentucky, supra. Accordingly, certiorari, or a grant-vacate-remand order, is warranted, so that the California court may apply for the first time the principles explicated in Miller-El.

D. If Comparative Juror Analysis Were Applied Here, as Was Done by the California Court of Appeal, It Would Result in a Finding of a Prima Facie Case of Discrimination as to at Least Two Jurors, and Petitioner's Conviction Would Be Reversed

In Miller-El this Court unanimously held that comparative juror analysis is a constitutionally proper technique to be employed by an appellate court in evaluating whether there was racial discrimination in jury selection in violation of Batson.[12]

> In this case, three of the State's proffered race-neutral rationales for striking African-American jurors pertained just as well to some white jurors who were not challenged and who did serve on the jury. The prosecution explained that their peremptory challenges against six African-American potential jurors were based on ambivalence about the death penalty, hesitancy to vote to execute defendants capable of being rehabilitated; and the jurors' own family history of criminality. In rebuttal of the prosecution's explanation, petitioner identified two empaneled white jurors who expressed ambivalence about the death penalty in a manner similar to their African-American counterparts who were the subject of prosecutorial peremptory challenges. One indicated that capital punishment was not appropriate for a first offense, and another stated that it would be "difficult" to impose a death sentence. Similarly, two white jurors expressed hesitation in sentencing to death a defendant who might be rehabilitated, and four white jurors had family members with criminal histories. As a consequence, even though the prosecution's reasons for striking African-American members of the venire appear race-neutral, the application of these rationales to the venire might have been selective and based on racial considerations. Whether a comparative juror analysis would demonstrate the prosecutor's rationales to have been pretexts for discrimination is an unnecessary determination at his stage, but the evidence does make debatable the District Court's conclusion that no purposeful discrimination occurred.
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> Miller-El v. Cockrell, supra, 123 S.Ct. at 1043, emphasis added.

The comparative juror analysis used on appeal by this Court in Miller-El is the same technique as that used by the California Court of Appeal here. (See Appendix B) That court found, utilizing comparative juror analysis, that every single reason claimed or hypothesized to be a basis of the prosecutor's challenges to the three black jurors equally applied to multiple white jurors whom the prosecutor accepted. No one has ever argued to the contrary. Accordingly, reliance on any such reason would be pretextual.

In this case, as to prospective juror Clodette Turner, the California Court of Appeal correctly used comparative juror analysis in finding a prima facie Batson case.

> No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the Wheeler motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by white juror number 7 (questionnaire #50) who also explained he had no opinions on the subject of those questions, and by white juror number 10 (questionnaire #89).
>
> Ms. T's answer to question 20 that she had a favorable opinion of African-American co-workers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White juror number 3

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[12]Even the concurring and dissenting justices in Miller-El agreed that comparative juror analysis may be performed on appeal. Id., 537 U.S. ____, 123 S.Ct. 1047, 1052.

(questionnaire #47), Hispanic/Latino juror number 6 (questionnaire #78), and white juror number 8 (questionnaire #10) all answered that they had favorable opinions of their African-American co-workers, and none was challenged by the prosecutor.

People v. Johnson, 88 Cal.App.4th at 333-334 (Appendix B)[13]

As to prospective juror Sara Edwards, the California Court of Appeal similarly and correctly used comparative juror analysis in finding a prima facie Batson case:

> With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) She failed to answer question 30 on the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have caused concerns. . . .
>
> [W]hite members of the venire who failed to answer questions served on the jury without objection from the district attorney.
>
> The arrest of Ms. E's parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror number 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate juror number 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge. . . .

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[13]The dissenting justice at the California Court of Appeal suggested one further possible reason for challenging Ms. Turner, namely, that her childlessness could have constituted a possible race-neutral reason for her challenge, on the theory that a childless juror could have lacked sufficient sympathy for the 19-month old victim. (88 Cal.App.4th at 347) This claim, too, fails under comparative juror analysis. The prosecution accepted four white jurors and one Hispanic juror who were similarly childless. (Juror #6, questionnaire #78; Juror #9, questionnaire 41; Juror #10, questionnaire 89; Juror #11, questionnaire 42; Juror #12, questionnaire 81).

> Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors . . . also indicated abhorrence of child abuse. . . .
>
> [4][footnote in original, 88 Cal.App.4th at 335]. In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28. "Do you have any legal training or have you taken any law courses?" The same answer was given by juror number 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas juror number 11 was questioned at length about her legal training and experience (pre-law as an undergraduate; worked at law firm in high school and college).
>
> People v. Johnson (formerly at) 88 Cal.App.4th 333-334 (Appendix B)

The California Supreme Court conspicuously failed to rebut the merits of these findings. Thus, if comparative juror analysis were applied here, it would establish a prima facie case for two black jurors, Clodette Turner and Sara Edwards.

Accordingly, certiorari should be granted because the California Supreme Court's refusal to apply comparative juror analysis violates federal constitutional law.

Alternatively, the Court should grant the petition, vacate the decision of the state court, and remand for reconsideration (GVR) in light of Miller-El v. Cockrell.

DATED: September 18, 2003

Respectfully submitted,

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TABLE OF APPENDICES

Appendix A: Opinion by California Supreme Court, filed June 30, 2003, published at 30 Cal.4th 1302

Appendix B: Opinion by California Court of Appeal, First District, Division 2, filed April 5, 2001, published at 88 Cal.App.4th 318.

APPENDIX A

[No. S097600. June 30, 2003.]

THE PEOPLE, Plaintiff and Respondent, v.
JAY SHAWN JOHNSON, Defendant and Appellant.

SUMMARY

A jury found defendant, an African-American man, guilty of the second degree murder of the 19-month-old daughter of his White girlfriend and of assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab). During jury selection, the prosecutor exercised 12 peremptory challenges, using three of them to challenge all three African-American prospective jurors on the jury panel. Defendant moved to require the prosecutor to justify the challenges by showing they were not the result of bias. The trial court denied the motion in a detailed ruling. (Superior Court of Contra Costa County, No. 96-0691-4, Patricia K. Sepulveda, Judge.) The Court of Appeal, First Dist., Div. Two, No. A085450, reversed.

The Supreme Court reversed the judgment of the Court of Appeal and remanded for further proceedings. The court held that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly. When a defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. The court also held that the practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable, fails to give due deference to the trial court's ruling, and is not required under federal law. In this case, the trial court was in the best position to make the determination. (Opinion by Chin, J., with George, C. J., Baxter, Brown, and Moreno, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. (see p. 1328). Dissenting opinion by Kennard, J. (see p. 1329).)

HEADNOTES

Classified to California Digest of Official Reports

(1a-1c) Jury § 47.6—Challenges—Peremptory—Group Bias—Prima Facie Case—Necessary Showing.—When a criminal defendant seeks to establish a prima facie case of discriminatory use of peremptory challenges to prospective jurors, California law uses two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias before the prosecution must explain its challenges. Although federal law uses the single term, "an inference of discriminatory purpose," the terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with the federal test. Under both tests, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. Thus, California's standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with federal law. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias.

[See 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 495 et seq.; West's Key Number Digest, Jury ⇐ 33(5.15).]

(2a-2d) Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis.—The practice of comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the prosecution's use of peremptory challenges, is unreliable and fails to give due deference to the trial court's ruling. This rule against comparative juror analysis for the first time on appeal does not violate any requirement of federal constitutional law. However, the rule has never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case. When the objecting party presents comparative juror analysis to the trial court, the reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when the record supports the trial court's finding of no prima facie case. While the practice is not prohibited outright, comparative

juror analysis for the first time on appeal would very rarely be fruitful or appropriate.

(3) **Jury § 47.9—Challenges—Peremptory—Group Bias.**—Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution.

(4) **Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Appellate Review—Comparative Juror Analysis—Rule of Deference.**—If the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered for peremptory challenges, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's determinations of credibility and would discount the variety of subjective factors and considerations, including prospective jurors' body language or manner of answering questions, which legitimately inform a trial lawyer's decision to exercise peremptory challenges. The concerns about the inability of a reviewing court to judge the dynamics of jury selection on a cold record also apply when the trial court determines whether the objector has established a prima facie case to begin with.

(5) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case.**—The trial court did not err in denying the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel. The record suggested grounds for the prosecutor to have reasonably challenged the jurors. The trial judge, who had performed much of, and observed the remainder of, the voir dire, and thus was in the best position to determine under all the relevant circumstances of the case whether a prima facie showing existed, mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. Although the trial court did not specifically discuss the third of the challenged jurors, at trial, defendant did not argue that no reason existed to challenge that juror. That all three African-American prospective jurors were removed was obviously highly relevant to whether a prima facie case existed, and the trial court gave it careful scrutiny, considered the question close, but found no prima facie case under all the circumstances. It would not be

appropriate to second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

(6) **Jury § 47.7—Challenges—Peremptory—Group Bias—Prima Facie Case—Failure to Question Jurors.**—In considering the motion of an African-American man, charged with the murder and assault resulting in death of his White girlfriend's baby, to require the prosecutor to justify his peremptory challenges of all three African-American prospective jurors on the panel, the fact that the district attorney asked no questions of the African-American jurors he challenged was of little or no significance. At the time, the trial court had primary responsibility for conducting voir dire, and the district attorney also asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged.

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OPINION

CHIN, J.—During jury selection, each party is entitled to a limited number of peremptory challenges. (Code Civ. Proc., § 231.) However, exercising peremptory challenges to remove prospective jurors solely because of group bias, for example, on racial grounds, violates both the California Constitution (*People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d

748] (*Wheeler*)) and the United States Constitution (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*)). Both *Wheeler* and, later, *Batson* established procedures for courts to follow when one party objects to the other party's peremptory challenges. Defendant contends that California's procedures violate *Batson* in two respects.

(1a) First, although both *Wheeler* and *Batson* require the objector to establish a prima facie case of discriminatory use of peremptory challenges before the other party must explain its challenges, *Wheeler* used two terms—"strong likelihood" and "reasonable inference"—to describe the necessary showing of group bias; *Batson* used the single term, "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]; *Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) Defendant argues that the "strong likelihood" standard states a different, and higher, requirement for establishing a prima facie case than *Batson* permits.

(2a) Second, we have observed that comparing, for the first time on appeal, the answers of excused jurors with those of jurors not excused to determine whether the trial court erred in denying an objection to the use of peremptory challenges is unreliable and fails to give due deference to the trial court's ruling. (E.g., *People v. Box* (2000) 23 Cal.4th 1153, 1190 [99 Cal.Rptr.2d 69, 5 P.3d 130]; *People v. Montiel* (1993) 5 Cal.4th 877, 909 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1222 [255 Cal.Rptr. 569, 767 P.2d 1047].) Defendant contends that this rule against "comparative juror analysis" violates *Batson*.

(1b) We conclude that *Wheeler*'s terms, a "strong likelihood" and a "reasonable inference," refer to the same test, and this test is consistent with *Batson*. Under both *Wheeler* and *Batson*, to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. **(2b)** We also conclude that *Batson* does not require state reviewing courts to engage in comparative juror analysis for the first time on appeal. Finally, applying California's procedures, which satisfy *Batson*, to this case, we uphold the trial court's finding that defendant failed to establish a prima facie case that the prosecutor used his peremptory challenges improperly.

Accordingly, we reverse the judgment of the Court of Appeal, which reached contrary conclusions.

I. Facts and Procedural History

A jury found defendant guilty of the second degree murder of the 19-month-old daughter of his girlfriend and of assault resulting in the death of a child under the age of eight. (Pen. Code, §§ 187, 273ab.) The issues before us solely involve jury selection, so we focus on that process.

The district attorney exercised 12 peremptory challenges. He used three of them to challenge all three African-American prospective jurors on the jury panel—C.T., S.E., and R.L. After the second of these challenges, defendant made a "*Wheeler* motion." (*Wheeler*, *supra*, 22 Cal.3d 258.) He stated that his motion, "[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by the People." He argued the prosecutor had no apparent reason to challenge this prospective juror "other than [her] racial identity." He made no argument regarding C.T. The court responded that, "based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." The court also told the district attorney, however, that "we are very close."

After the third of these challenges, defendant renewed his *Wheeler* motion. Focusing this time on the most recent challenge, he based his motion on the circumstance that the district attorney had removed all of the African-American prospective jurors. The court denied the motion in a detailed ruling. Regarding the most recent challenge, the court stated that it had had "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side, frankly, based upon the concerns about her ability to understand the proceedings."

The court noted the rest of the district attorney's challenges were against "all other types of groups, including white women and white men as well." Regarding S.E., the court stated that it had been concerned about her, "including the answer on question thirty that she gave verbally here in court

that she had not included in her questionnaire; a parent had a robbery or arrest, even though that was a number of years ago, thirty years ago. Her answers on the record were not as such that I would have granted a challenge for cause. Certainly, they could justify a challenge by the People. [¶] She expressed on the record that she didn't know if she could be fair. Her verbal follow-up responses were not such that I would have granted a challenge for cause. And also based upon the answers with regard to question sixty-three . . . her emotions and feelings, again, her answers were such that they may have caused concern for either side. Even though the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence." "In summary," the court said, "with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case."

The Court of Appeal reversed the judgment. It found that the "strong likelihood" standard the trial court applied violated *Batson*, *supra*, 476 U.S. 79. Based primarily on its own comparison of answers the challenged jurors gave with answers of nonchallenged jurors, the court concluded that "a prima facie case of group bias was established and that the judgment must therefore be reversed." Justice Haerle dissented on all points.

We granted the Attorney General's petition for review.

II. Discussion

A. *Background*

(3) Exercising peremptory challenges because of group bias rather than for reasons specific to the challenged prospective juror violates both the California Constitution and the United States Constitution. (*Batson*, *supra*, 476 U.S. 79; *Wheeler*, *supra*, 22 Cal.3d 258.) Because *Wheeler* predated *Batson*, the *Wheeler* court obviously did not have the benefit of *Batson* in establishing the procedures to follow in California. Defendant argues that California's procedures violate *Batson* in two respects: (1) *Wheeler*'s "strong likelihood" standard, or at least the way it was understood and applied in later cases, is a higher standard than *Batson* permits; and (2) California law impermissibly restricts comparative juror analysis. We discuss these contentions in order below, then review the trial court's rulings. But first, to fully understand these issues, it is necessary to review *Wheeler* and *Batson* in detail.

1. *Wheeler*

In *Wheeler*, we concluded "that the use of peremptory challenges to remove prospective jurors on the sole ground of group bias violates" the California Constitution. (*Wheeler*, *supra*, 22 Cal.3d at p. 276.) We then turned to the difficult question of what to do when one party objects to the other party's peremptory challenges on this basis. We began "with the proposition that in any given instance the presumption must be that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground. . . . [¶] Yet it is only a presumption, and must be rebuttable if the foregoing constitutional right is not to be nullified even by honest zeal. The issue is what showing is necessary to rebut it. We must define a burden of proof which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Id.* at p. 278.)

We adopted the following procedure: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." (*Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. omitted.) We discussed types of evidence the objector may present to make this showing. "[T]he party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group. He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or indeed to ask them any questions at all. Lastly, . . . the defendant need not be a member of the excluded group in order to complain of a violation of the representative cross-section rule; yet if he is, and especially if in addition his alleged victim is a member of the group to which the majority of the remaining jurors belong, these facts may also be called to the court's attention." (*Id.* at pp. 280-281, fn. omitted.)

We then discussed what the court must do. "Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must

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determine whether a reasonable inference arises that peremptory challenges are being used on the ground of group bias alone. We recognize that such a ruling 'requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors.' [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim interposed simply for purposes of harassment or delay.

"If the court finds that a prima facie case has been made, the burden shifts to the other party to show if he can that the peremptory challenges in question were not predicated on group bias alone. The showing need not rise to the level of a challenge for cause. But to sustain his burden of justification, the allegedly offending party must satisfy the court that he exercised such peremptories on grounds that were reasonably relevant to the particular case on trial or its parties or witnesses—i.e., for reasons of specific bias as defined herein. He, too, may support his showing by reference to the totality of the circumstances: for example, it will be relevant if he can demonstrate that in the course of this same voir dire he also challenged similarly situated members of the majority group on identical or comparable grounds. And again we rely on the good judgment of the trial courts to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination.

"If the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted." (*Wheeler*, *supra*, 22 Cal.3d at pp. 281-282, fn. omitted.)

2. *Batson*

In *Batson*, the United States Supreme Court held that principles of equal protection "forbid discrimination on account of race in selection of the petit jury." (*Batson*, *supra*, 476 U.S. at p. 88 [106 S.Ct. at p. 1718].) It, too, discussed what to do when one party objects to the other party's peremptory challenges. "As in any equal protection case, the 'burden is, of course,' on the defendant who alleges discriminatory selection of the venire 'to prove the existence of purposeful discrimination.' [Citations.] In deciding if the defendant has carried his burden of persuasion, a court must undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.' [Citation.] Circumstantial evidence of invidious intent may be proof of disproportionate impact. [Citation.] We have observed that

under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on non-racial grounds.' [Citation.] For example, 'total or seriously disproportionate exclusion of Negroes from jury venires,' [citation] 'is itself such an "unequal application of the law . . . as to show intentional discrimination." ' [citations]." (*Id.* at p. 93 [106 S.Ct. at p. 1721].)

A party alleging discriminatory use of peremptories "may make out a prima facie case of purposeful discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. [Citation.] Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion." (*Batson*, *supra*, 476 U.S. at pp. 93-94 [106 S.Ct. at p. 1721].) In a footnote, the court stated that its "decisions concerning 'disparate treatment' under Title VII of the Civil Rights Act of 1964 have explained the operation of prima facie burden of proof rules. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668] (1973); *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248 [101 S.Ct. 1089, 67 L.Ed.2d 207] (1981); *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711 [103 S.Ct. 1478, 75 L.Ed.2d 403] (1983). The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion. *Texas Dept. of Community Affairs* v. *Burdine*, *supra*, at 252-256 [101 S.Ct. at pp. 1093-1095]." (*Id.* at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].)

The high court discussed in detail the "standards for assessing a prima facie case in the context of discriminatory selection of the venire . . . ." (*Batson*, *supra*, 476 U.S. at p. 96 [106 S.Ct. at p. 1723].) "[A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group [citation], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race.[1] Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits

[1]Both *Wheeler*, *supra*, 22 Cal.3d 258, and *Batson*, *supra*, 476 U.S. 79, like this case, involve criminal defendants claiming prosecutors impermissibly challenged members of the defendants' own ethnic group. Other cases have expanded the prohibition into other circumstances. (E.g., *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127 [114 S.Ct. 1419, 128 L.Ed.2d 89] [gender]; *Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33] [defendant's exercise of peremptory challenges]; *Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660] [civil cases]; *Powers v. Ohio* (1991) 499 U.S. 400 [111 S.Ct. 1364, 113 L.Ed.2d 411] [defendant need not be member of the

'those to discriminate who are of a mind to discriminate.' [Citation.] Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury . . . raises the necessary inference of purposeful discrimination.

"In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors." (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723].)

"Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. . . . The prosecutor . . . must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination." (*Batson*, *supra*, 476 U.S. at pp. 97-98 [106 S.Ct. at p. 1723], fns. omitted.) In a footnote, the court also stated, "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Id.* at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

In rejecting an argument that its holding could create serious administrative difficulties, the high court noted that "[i]n those States applying a version of the evidentiary standard we recognize today," courts have not experienced these difficulties. (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at p. 1724].) "For example, in *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), the California Supreme Court found that there was no evidence to show that procedures implementing its version of this standard, imposed five years earlier, were burdensome for trial judges." (*Id.* at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

B. *The Necessary Showing for a Prima Facie Case*

(1c) *Wheeler* used both the terms "strong likelihood" and "reasonable inference" in describing the standard for a prima facie case. (*Wheeler*, *supra*,

excluded group]; *People v. Willis* (2002) 27 Cal.4th 811 [118 Cal.Rptr.2d 301, 43 P.3d 130] [defendant's exercise of peremptory challenges].) We need not consider these cases here.

22 Cal.3d at pp. 280, 281.) We believe it obvious that we considered the two terms to be different phrasing of the same standard. Language in a 1994 Court of Appeal decision, *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486], however, created some uncertainty. That case seemed to read the two terms as stating different standards, with "reasonable inference" being a lower standard than "strong likelihood." (*Id.* at p. 465.)

In *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the court found that, at least after *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Wade v. Terhune*, *supra*, at pp. 1196-1197.) The court noted also that, in recent years, this court has generally cited the "strong likelihood" language rather than the "reasonable inference" language. (*Id.* at p. 1197.) It believed that California courts give criminal defendants less protection than the United States Constitution requires "when they follow the *Wheeler* 'strong likelihood' test in determining whether a *prima facie* case has been established." (*Wade v. Terhune*, *supra*, at p. 1197.) In the court's view, "the *Wheeler* 'strong likelihood' test for a successful *prima facie* showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Ibid.*) The court "therefore conclude[d] that California courts in following the 'strong likelihood' language of *Wheeler* are not applying the correct legal standard for a *prima facie* case under *Batson*." (*Ibid.*)

Shortly after *Wade v. Terhune*, *supra*, 202 F.3d 1190, and in response to it, we reiterated that "in California, a 'strong likelihood' means a 'reasonable inference,' " and disapproved *People v. Bernard*, *supra*, 27 Cal.App.4th 458, "to the extent it is inconsistent with *People v. Wheeler*, *supra*, 22 Cal.3d at pages 280-281." (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7.) However, the Ninth Circuit Court of Appeals held that this action did not cure the problem it perceived, at least for cases tried after *Bernard* and before *Box* in which trial courts were "following *Bernard*'s take on *Wheeler*." (*Cooperwood v. Cambra* (9th Cir. 2001) 245 F.3d 1042, 1047.) It said that "regardless" of our action in *People v. Box*, *supra*, at page 1188, footnote 7, "whenever state courts use the 'strong likelihood' standard, . . . these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Cooperwood v. Cambra*, *supra*, at p. 1047.) The majority below agreed and, accordingly, found that the trial court used an impermissible standard in determining whether defendant had established a prima facie case.

We reiterate what we implied in *Wheeler* and stated in *Box*: *Wheeler*'s terms "strong likelihood" and "reasonable inference" state the same standard. (*People v. Box*, *supra*, 23 Cal.4th at p. 1188, fn. 7; *Wheeler*, *supra*, 22

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Cal.3d at pp. 280-281.) This has always been true, although we recognize that *People v. Bernard*, *supra*, 27 Cal.App.4th 458, may have created some uncertainty for a few years. But the important question for current purposes is not whether California courts have always viewed these terms as the same, but whether California's "strong likelihood" standard violates *Batson*. The *Wade v. Terhune* court and the majority below assumed that *Batson*'s inference test is "more generous" than *Wheeler*'s strong likelihood test without examining what the United State Supreme Court itself has said on the matter. (*Wade v. Terhune*, *supra*, 202 F.3d at p. 1197.) But to address this question, it is necessary to delineate exactly what the high court meant when it equated the necessary prima facie case with "an inference of discriminatory purpose." (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721].) We believe the court has made its meaning clear.

The high court appears to have given other courts some flexibility in establishing the exact procedures to follow. "We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." (*Batson*, *supra*, 476 U.S. at p. 99 [106 S.Ct. at pp. 1724-1725].) Thus, to some extent at least, *Batson* seems to have "left to lower courts the task of determining the type and quantum of proof necessary for a defendant to establish a prima facie case." (*State v. Duncan* (La. 2001) 802 So.2d 533, 545; see also Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection?* (1988) 74 Va. L.Rev. 811, 817 ["The Supreme Court has left the lower courts to grapple with the proper implementation of the *Batson* test. They must determine not only the quantum of proof necessary for a defendant to establish a prima facie case but also the types of explanations sufficient to rebut the defendant's claim"].) But whatever flexibility the high court has left state courts, the California standard is not less generous than the test the *Batson* court itself applies to establish a prima facie case.

In *Batson*, the court stated that its decisions under title VII of the Civil Rights Act of 1964 "explained the operation of prima facie burden of proof rules." (*Batson*, *supra*, 476 U.S. at p. 94, fn. 18 [106 S.Ct. at pp. 1721-1722].) The court has since repeatedly cited title VII cases as authoritative in the *Batson* context. (*Miller-El v. Cockrell* (2003) 537 U.S. 322, __ [123 S.Ct. 1029, 1041, 154 L.Ed.2d 931] (*Miller-El*); *Purkett v. Elem* (1995) 514 U.S. 765, 768 [115 S.Ct. 1769, 1771, 131 L.Ed.2d 834]; *Hernandez v. New York* (1991) 500 U.S. 352, 359 [111 S.Ct. 1859, 1866, 114 L.Ed.2d 395] (plur. opn.).) One of the decisions the court cited in *Batson*, *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668], made clear that the plaintiff carried the initial burden of showing actions "from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were 'based on a discriminatory criterion illegal under the Act.' " (*Furnco Construction Corp. v. Waters* (1978) 438 U.S. 567, 576 [98 S.Ct. 2943, 2949, 57 L.Ed.2d 957], italics added.) Another of the decisions that *Batson* cited explained that the burden is not "onerous," but the party nevertheless had to prove "by the *preponderance of the evidence* a prima facie case of discrimination." (*Texas Dept. of Community Affairs v. Burdine* (1981) 450 U.S. 248, 252-253 [101 S.Ct. 1089, 1093], italics added.) It stated that "the prima facie case 'raises an *inference* of discrimination only because we presume these acts, if otherwise unexplained, are *more likely than not* based on the consideration of impermissible factors.' " (*Id.* at p. 254 [101 S.Ct. at p. 1094], italics added.)

In one of the cases *Batson* cited, the high court recognized that the term "prima facie case" is, by itself, ambiguous, so it specifically stated what it meant in this context. "The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. 9 J. Wigmore, Evidence § 2494 (3d ed. 1940). *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense." (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 254, fn. 7 [101 S.Ct. at p. 1094].) Thus, when it refers to the objector establishing "an inference of discriminatory purpose" (*Batson*, *supra*, 476 U.S. at p. 94 [106 S.Ct. at p. 1721]), the high court means establishing a legally mandatory rebuttable presumption, and *not* merely presenting enough evidence to *permit the inference*.

Wigmore, in turn, goes into greater detail. He explains that the term " 'prima facie case' is used in two senses . . . ." (9 Wigmore, Evidence (Chadbourne rev. ed. 1981) § 2494, p. 378.)[2] The sense the high court does *not* mean in this context created the lower of the two burdens—merely the "duty of producing *some evidence*" sufficient to allow a matter to go to the jury. (Wigmore, at p. 379, italics added.) Wigmore also deseribes the sense in which the high court uses the term. "[T]he term 'prima facie' is sometimes used as *equivalent to the notion of a presumption*, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence." (*Ibid.*) Thus, it applies "where the proponent, having the burden of proving the issue (i.e., the risk of nonpersuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge or the jury, but has gone further, and, either by means

[2]We are quoting the most recent revision of this work rather than the earlier version the high court cited in *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. 248; the two versions are identical as relevant.

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of a presumption or by a general mass of *strong evidence*, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." (*Ibid.*, italics added.)

Thus, *Batson* permits a court to require the objector to present, not merely "some evidence" permitting the inference, but "strong evidence" that makes discriminatory intent more likely than not if the challenges are not explained. Nothing suggests the high court has since modified *Batson*'s approach. Indeed, in its most recent decision on this subject, it said it was considering "the three-step framework mandated by *Batson* and reaffirmed in our later precedents" and, in describing the prima facie case requirement, echoed *Batson*'s "inference" language. (*Miller-El*, *supra*, 537 U.S. at pp. ___, ___ [123 S.Ct. at pp. 1040, 1045] ["the inference of discrimination to support a prima facie case"].)

Other states, although not all,[3] have reached similar conclusions regarding *Batson*'s meaning. Citing *Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at pages 252-253 [101 S.Ct. at page 1093], the Connecticut Supreme Court has said that under the first stage of the *Batson* inquiry, the "defendant must establish by a preponderance of the evidence a prima facie case of purposeful discrimination." (*State v. Gonzalez* (1988) 206 Conn. 391 [538 A.2d 210, 213].) The Maryland Court of Appeals recognized that *Batson* cited title VII cases "for an explanation of the operation of prima facie burden of proof rules." (*Stanley v. State* (1988) 313 Md. 50 [542 A.2d 1267, 1271].) The Maryland Court of Appeals also concluded that "to make the *prima facie* showing *Batson* requires, the moving party must 'prove by a preponderance of the evidence that the peremptory challenges were exercised in a way that shifts the burden of production to the State and requires it to respond to the rebuttable presumption of purposeful discrimination that arises under certain circumstances.'" (*Mejia v. State* (1992) 328 Md. 522 [616 A.2d 356, 361], quoting *Stanley v. State*, *supra*, at p. 1277.)

Wheeler's term "strong likelihood" signals that it meant "prima facie case" in a similar sense.[4] This burden is not onerous (*Texas Dept. of Community Affairs v. Burdine*, *supra*, 450 U.S. at p. 253 [101 S.Ct. at pp. pp. 1093-1094]), but it is substantial. It is also appropriate to compel the objecting party to meet this burden before it can force the other party to explain the reasons for its peremptory challenges. The burden is one "which a party may reasonably be expected to sustain in meritorious cases, but which he cannot abuse to the detriment of the peremptory challenge system." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) The high court itself has noted that the *Batson* analysis "permits prompt rulings on objections to peremptory challenges without substantial disruption of the jury selection process." (*Hernandez v. New York*, *supra*, 500 U.S. at p. 358 [111 S.Ct. at pp. 1865-1866] (plur. opn.); see also *id.* at p. 374 [111 S.Ct. at p. 1874] (conc. opn. of O'Connor, J.) [warning against "unacceptable delays in the trial process" that would be "antithetical to the nature and purpose of the peremptory challenge"].)

The term "strong likelihood" has never set a higher standard than *Batson* permits. *Wheeler* "define[d] a burden of proof . . . ." (*Wheeler*, *supra*, 22 Cal.3d at p. 278.) "Except as otherwise provided by law," the default burden of proof in California is "proof by a preponderance of the evidence." (Evid. Code, § 115; see *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546 [110 Cal.Rptr.2d 412, 28 P.3d 151].) Here, no other law has provided for a different standard. This court has never suggested that *Wheeler* imposed the burden of either clear and convincing proof or proof beyond a reasonable doubt, the two higher burdens of proof that exist in this state. (Evid. Code, § 115.) Moreover, the unqualified word "likelihood" would have been insufficient to signal the correct standard. That word, or the equivalent "likely," has a range of meanings, including some lower than more likely than not. (See *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 917, 922 [119 Cal.Rptr.2d 1, 44 P.3d 949] [interpreting a statute using the word "likely" as not requiring a showing of a "better than even" chance].) Thus, qualifying "likelihood" with "strong" is appropriate and consistent with *Batson*.

Although not dispositive, the *Batson* court itself considered *Wheeler*'s procedures comparable to its own. It did not specifically cite *Wheeler*'s "strong likelihood" language, but it referred to this court's "procedures implementing its version of [*Batson*'s evidentiary] standard" without suggesting there was anything wrong with those procedures. (*Batson*, *supra*, 476 U.S. at p. 99, fn. 23 [106 S.Ct. at p. 1724].)

We disagree that the "strong likelihood" standard became too high in the interval between *People v. Bernard*, *supra*, 27 Cal.App.4th 458, and *People*

[3]The Colorado Supreme Court, for example, has interpreted *Batson* as not requiring the defendant "to prove by a preponderance of the evidence that discrimination occurred. Rather, the defendant must present evidence sufficient to raise an inference that discrimination occurred." (*Valdez v. People* (Colo. 1998) 966 P.2d 587, 590.) But the court did not examine what the high court itself has stated on the question.

[4]The dissent claims Evidence Code section 600, subdivision (b), which defines an inference as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action," somehow supports its position. (Dis. opn., *post*, at p. 1334.) The *Wheeler* court certainly understood that an inference is a logical deduction of fact. But the question here, which Evidence Code section 600 does not address, is how strong the inference must be. In a criminal trial, for example, an inference of guilt must be beyond a reasonable doubt. The dissent's own unique proposed test—"a substantial danger that the prosecutor's challenges were based on improper grounds"—is not found in Evidence Code section 600. (Dis. opn., *post*, at p. 1334.)

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v. Box, *supra*, 23 Cal.4th 1153. *Bernard* did not somehow transform "strong likelihood" from a correct to an incorrect standard. Like the court in *Wade v. Terhune*, *supra*, 202 F.3d 1190, and the majority below, the *Bernard* court did not examine what *Wheeler* or the high court meant by the word "inference" in this context. It misunderstood that meaning. The *Bernard* court said the presumption that peremptory challenges are being used properly should be rebuttable "only by a strong showing, not a mere inference," because a different standard "might easily transform removal of each and every prospective juror belonging to a cognizable group into a *Wheeler* hearing." (*People v. Bernard*, *supra*, at p. 465.) It also referred to "a reduction of the prima facie standard to a 'reasonable inference' test." (*Ibid.*) This use of the word "inference" was akin to Wigmore's lower sense of evidence merely permitting one to draw an inference, not the higher sense of *Batson* and *Wheeler*. Thus, to the extent *Bernard* erred, it was in assuming "inference" was lower than it really is in this context, not in raising "strong likelihood" to an impermissibly high standard.

Accordingly, *Wheeler*'s standard for establishing a prima facie case of discriminatory use of peremptory challenges is, and always has been, compatible with *Batson*. It merely means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias. The trial court here properly cited the *Wheeler* standard in determining whether defendant had established a prima facie case.

C. *Appellate Use of Comparative Juror Analysis*

The majority below compared the answers of challenged jurors with those of nonchallenged jurors, a comparison not done at trial, in order to overturn the trial court's finding of no prima facie case. Defendant argues that doing so was proper and that our cases, which he interprets as prohibiting all comparative juror analysis, violate *Batson*, *supra*, 476 U.S. 79. Defendant misunderstands our jurisprudence. **(2c)** We have observed that engaging in comparative juror analysis *for the first time on appeal* is unreliable and inconsistent with the deference reviewing courts necessarily give to trial courts, but we have never prohibited trial courts from doing so or the party objecting to the challenges from relying on such analysis in seeking to make a prima facie case.

In *People v. Johnson*, *supra*, 47 Cal.3d 1194, we revisited *People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719], which had engaged in comparative juror analysis for the first time on appeal. We found that *Trevino* had "placed undue emphasis on comparisons of the stated

reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor. First, we note . . . that the comparison is one-sided since it ignores the characteristics of the other . . . jurors against whom the prosecutor also exercised peremptory challenges. [Citation.] Moreover, we fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial." (*People v. Johnson*, *supra*, at p. 1220.)

We explained that "use of a comparison analysis to evaluate the bona fides of the prosecutor's stated reasons for peremptory challenges does not properly take into account the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar. Trial lawyers recognize that it is a combination of factors rather than any single one which often leads to the exercise of a peremptory challenge. In addition, the particular combination or mix of jurors which a lawyer seeks may, and often does, change as certain jurors are removed or seated in the jury box." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220.)[5] We found it apparent "that the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar. [Attempting] to make such an analysis of the prosecutor's use of his peremptory challenges is highly speculative and less reliable than the determination made by the trial judge who witnessed the process by which the defendant's jury was selected. It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose." (*Id.* at p. 1221.)

Accordingly, we disapproved *People v. Trevino*, *supra*, 39 Cal.3d 667, to the extent it was inconsistent with these views and returned to a "standard of truly giving great deference to the trial court in distinguishing bona fide reasons from sham excuses." (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1221.) Like the high court, we stated we " 'may assume that trial judges, in supervising *voir dire* in light of our decision today, will be alert to identify a prima facie case of purposeful discrimination.' " (*Ibid.*, quoting *Batson*, *supra*, 476 U.S. at p. 99, fn. 22 [106 S.Ct. at p. 1724].)

Since then, we have not engaged in comparative juror analysis for the first time on appeal. **(4)** "If the trial court makes a 'sincere and reasoned

[5]This case presents an example. The district attorney accepted the jury four times with C.T. on it before he peremptorily challenged her, apparently due to a change in the jury's composition.

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effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis. Such an approach would undermine the trial court's credibility determinations and would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*People v. Montiel, supra*, 5 Cal.4th at p. 909.)

Defendant argues that *any* rule against comparative juror analysis is invalid but, as a backup position, he also argues that, at least, the rule is limited to the *second* stage of the trial court's duty—judging the validity of the reasons for the exercising of challenges after it has found a prima facie case—and does not apply to the *first* stage—judging whether the objector has established a prima facie case to begin with. We disagree. Although some of our decisions, including *People v. Johnson, supra*, 47 Cal.3d 1194, did involve the second stage, others reviewed trial court findings of no prima facie case. (E.g., *People v. Box, supra*, 23 Cal.4th at pp. 1188, 1190; *People v. Turner* (1994) 8 Cal.4th 137, 167, 169-170 [32 Cal.Rptr.2d 762, 878 P.2d 521].) Differences do exist in the two procedural postures. At the first stage, the party making the challenges is not asked to explain them, so the trial court does not have to judge that party's credibility. But the concerns about the inability of a reviewing court to judge the dynamics of jury selection *on a cold record* apply to both stages. A comparison of the jurors' answers is unreliable when divorced from the context of the trial. A trial court, but not a reviewing court, is able to place the answers into context and draw meaning from *all* the circumstances, including matters not discernable from the record.

Even the Ninth Circuit Court of Appeals, which has a different practice in this regard than we (*Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1427), reviews a trial court's finding of no prima facie case deferentially. (*Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 (in bank).) Its reasoning for giving such deference echoes ours both in giving similar deference and in not engaging in comparative juror analysis for the first time on appeal. "[T]he trial court is better positioned to decide the *Batson* prima facie issue, which involves a ' "factual inquiry" that "takes into account all the possible explanatory factors" in the particular case.' [Citation.] Whether or not 'all the relevant circumstances' 'raise an inference' of discrimination will depend on factors such as the attitude and behavior of the challenging attorney and the prospective jurors manifested during voir dire. As a purely practical matter, the trial judge's unique perspective of voir dire enables the judge to have

first-hand knowledge and observation of critical events. [Citation.] The trial judge personally witnesses the totality of circumstances that comprises the 'factual inquiry,' including the jurors' demeanor and tone of voice as they answer questions and counsel's demeanor and tone of voice in posing the questions. [Citation.] The trial judge is able to observe a juror's attention span, alertness, and interest in the proceedings and thus will have a sense of whether the prosecutor's challenge can be readily explained by a legitimate reason. . . . In addition, the trial court is 'experienced in supervising voir dire.' [Citations.]

"The appellate court, on the other hand, must judge the existence of a prima facie case from a cold record. An appellate court can read a transcript of the voir dire, but it is not privy to the unspoken atmosphere of the trial court—the nuance, demeanor, body language, expression and gestures of the various players. [Citation.] . . . [T]he prima facie inquiry is so fact-intensive and so dependent on first-hand observations made in open court that the trial court is better positioned to decide the issue . . . ." (*Tolbert v. Page, supra*, 182 F.3d at pp. 683-684.)

"While [*People v. Johnson, supra*, 47 Cal.3d 1194] limits the scope of appellate review of a trial court's *Batson* determination, it does not preclude comparative analysis by the trial court." (*Burks v. Borg, supra*, 27 F.3d at p. 1428.) We do not, and cannot reasonably, require trial judges to perform such analysis *itself* (*People v. Johnson, supra*, 47 Cal.3d at p. 1220), but the objecting party may make the argument for the trial court to evaluate. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], the defendant presented at trial "evidence, compiled from the biographical information of 50 prospective jurors," and compared those jurors' answers in support of his argument that the prosecutor improperly challenged a particular juror. (*Id.* at p. 116.) As the reviewing court, we considered this and other evidence and concluded that "[i]n light of all the relevant circumstances, the trial court properly could find that defendant had not made a prima facie showing . . . ." (*Id.* at p. 119.)

In support of his position, defendant cites *Miller-El, supra*, 537 U.S. 322 [123 S.Ct. 1029], but that case merely provides another example of a reviewing court considering evidence of comparative juror analysis after it had been presented to the trial court. *Miller-El* was tried before the decision in *Batson, supra*, 476 U.S. 79. At trial, the defendant had objected that the prosecution was using peremptory challenges discriminatorily, but the *Batson* procedures had not yet been established. *Batson* was decided while the case was on appeal. The Texas Court of Criminal Appeals remanded the case to the original trial court for new findings in light of *Batson*. Defendant

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presented to the trial court several types of evidence supporting a prima facie case. Before the original trial, he had presented "evidence relating to a pattern and practice of race discrimination in the *voir dire*." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1036].) Then, two years later, "he presented, to the same state [trial] court, evidence that directly related to the conduct of the prosecutors in his case." (*Ibid.*) Some of the latter evidence was comparative juror analysis of the type offered for the first time on appeal here. (*Id.* at p. __ [123 S.Ct. at p. 1043].) After the state courts denied relief, the federal district court denied relief on federal habeas corpus, and the appellate court denied a certificate of appealability which, under federal law, prevented the defendant from appealing the matter. The United States Supreme Court reversed the denial of a certificate of appealability. It did not directly address the *Batson* question, but rather determined that the issue was "debatable" and, under federal habeas corpus law, the appellate court should have considered it on the merits. (*Id.* at p. __ [123 S.Ct. at p. 1045].) Its discussion made clear that the comparative juror analysis presented to the trial court was among the evidence reviewing courts should consider. (*Id.* at p. __ [123 S.Ct. at p. 1043].) This conclusion is consistent with our practice. Nothing in *Miller-El*, however, suggests that a reviewing court must engage in comparative juror analysis *for the first time on appeal*.

Both *Wheeler* and *Batson* place the burden of making the prima facie showing on the objecting party. (*Batson*, *supra*, 476 U.S. at p. 96 ["the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race"]; *Wheeler*, *supra*, 22 Cal.3d at p. 280 [the objecting party must "make a prima facie case of . . . discrimination to the satisfaction of the court," should "make as complete a record of the circumstances as is feasible," and "from all the circumstances of the case . . . must show a strong likelihood" of improper challenges].) Neither decision requires a reviewing court to search the record itself for evidence that might have supplemented the objector's showing. Nor must the trial court consider arguments not made and evidence not presented, although nothing prevents it from doing so in judging all of the circumstances.

Defendant argues that our statement that we cannot expect a trial judge "to make such detailed comparisons mid-trial" (*People v. Johnson*, *supra*, 47 Cal.3d at p. 1220) "overlooks the trial lawyers' role." He argues that the attorneys can make these arguments to assist the trial court "because, under the adversary system, the job of marshaling the relevant evidence is performed in the first instance by the lawyers. Accordingly, comparative juror analysis can easily and realistically be employed by state trial judges, too." We agree. Indeed, as noted, *People v. Crittenden*, *supra*, 9 Cal.4th 83, provides an example of the attorneys doing just this for the trial court's consideration. But defendant did not make this kind of showing at trial, and we cannot expect the trial court to do so itself.

We have also said that comparative juror analysis is "largely beside the point" because of the legitimate subjective concerns that go into selecting a jury. (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980].) But it is not *irrelevant*. Although such analysis, by itself, proves little, properly presented to the trial court, it can be among the "all relevant circumstances" (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723]) or "all the circumstances of the case" (*Wheeler*, *supra*, 22 Cal.3d at p. 280) that the trial court must consider in making its determination.

In *People v. Howard* (1992) 1 Cal.4th 1132 [5 Cal.Rptr.2d 268, 824 P.2d 1315], we did not "limit[] our review . . . solely to counsel's presentation at the time of the motion. This is because other circumstances might support the finding of a prima facie case even though a defendant's showing [was itself inadequate]. Nor should the trial court blind itself to everything except defense counsel's presentation. Indeed, we have emphasized that such rulings require trial judges to consider 'all the circumstances of the case' [citation] and call upon judges' ' "powers of observation, their understanding of trial techniques, and their broad judicial experience." ' [Citations.] The trial judge in this case, for example, obviously knew that defendant belonged to the same group as the challenged jurors and that his victims did not. Clearly these are relevant factors [citation], and they were apparent to the trial court even though defendant did not mention them during his *Wheeler* motion." (*Id.* at p. 1155.) "For these reasons," we said, "when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias the reviewing court considers the entire record of voir dire." (*Ibid.*) Certainly, the trial court should consider obvious matters, and it can consider any other circumstances it finds relevant in the particular case. But, midtrial, we cannot expect, and do not demand, trial courts to engage sua sponte in the sort of comparative juror analysis that appellate lawyers and courts can do after scouring the often lengthy appellate record during the appeal. And, given the inability of reviewing courts to reliably conduct such analysis on a cold record, those courts are not required to do so for the first time on appeal.

Defendant cites a number of federal cases that engage in comparative juror analysis in a different way than we do. The Ninth Circuit, for example, has stated that its practice is different than ours. (*Burks v. Borg*, *supra*, 27

F.3d at p. 1427.)[6] Other courts may certainly adopt different procedures than we. But we do not believe that comparative juror analysis for the first time on appeal is constitutionally compelled. The *Batson* court itself stated that in deciding whether the defendant has made the necessary showing, "the *trial court* should consider all relevant circumstances." (*Batson*, *supra*, 476 U.S. at pp. 96-97 [106 S.Ct. at p. 1723], italics added.) It relies heavily on "trial judges, experienced in supervising *voir dire*," to make this determination. (*Id.* at p. 97 [106 S.Ct. at p. 1723].) "During jury selection, the entire *res gestae* take place in front of the trial judge. Because the judge has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges." (*United States v. Armstrong* (1996) 517 U.S. 456, 467-468 [116 S.Ct. 1480, 1488, 134 L.Ed.2d 687].) The "entire *res gestae*" do not take place in front of an appellate court.

The *Batson* court rejected the argument that its holding would "create serious administrative difficulties" and noted that California had not found its own version to be "burdensome for trial judges." (*Batson*, *supra*, 476 U.S. at p. 99 & fn. 23 [106 S.Ct. at p. 1724], citing *People v. Hall* (1983) 35 Cal.3d 161 [197 Cal.Rptr. 71, 672 P.2d 854].) However, requiring trial courts to engage in comparative juror analysis sua sponte in the middle of the trial *would* be burdensome. Moreover, permitting appellate courts to overturn trial court decisions based on their own comparative analysis of a cold record, divorced from the nuances of trial not apparent from the record, is inconsistent with the deference reviewing courts necessarily give trial courts. We see nothing in the high court decisions requiring us to defer less to trial courts or engage in our own comparative juror analysis for the first time on appeal.[7]

(2d) Accordingly, we maintain our long-standing practice. When the objecting party presents comparative juror analysis to the trial court, the

[6]That court also noted that the United States Supreme Court "has not yet ruled on the role of comparative analysis on appellate review, so no one is quite sure whether our circuit or the California Supreme Court is right." (*Burks v. Borg*, *supra*, 27 F.3d at p. 1427.)

[7]The dissent claims that our reliance on *People v. Johnson*, *supra*, 47 Cal.3d 1194, is misplaced because *Johnson* barred using comparative juror analysis on appeal *whether or not the parties raised that approach in the trial court.* (Dis. opn., *post*, at pp. 1330-1332.) Contrary to the dissent, *Johnson*'s underlying rationale was predicated on the fact that the defendant made no comparative juror argument *at trial*. We reasoned that: (1) a trial judge could not reasonably be expected to make detailed comparisons of jurors midtrial *sua sponte*, and (2) *without explanation at trial* from the party who exercised the challenge, comparative juror analysis could not accurately take into account the various factors that influence the decision to make a peremptory challenge. (*Johnson*, *supra*, at pp. 1220-1221.) We then concluded, "It should be apparent, *therefore*, that the very dynamics of the jury selection process make it difficult, if not impossible, *on a cold record*, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which *on paper* appears to be substantially similar." (*Id.* at p. 1221, italics added.) In other words, the trial and appellate courts are in no position to engage in comparative juror analysis on their own, without the issue first being raised by the parties at trial. Our approach is entirely consistent with *Johnson*.

Contrary to the dissent, *People v. Johnson*, *supra*, 47 Cal.3d 1194, is also entirely consistent with *Miller-El*. In that case, the high court had "no difficulty in using comparative juror analysis" (dis. opn., *post*, at p. 1332) because it was simply reviewing the state court record, i.e., comparative juror evidence that the defendant had first presented to the trial judge in support of his *Batson* motion. (*Miller-El*, *supra*, 537 U.S. at pp. ___ - ___ [123 S.Ct. at pp. 1035-1036, 1043-1045].) Evidently, none of the parties disputed that a comparative juror analysis is a proper or necessary procedure in deciding a *Batson* claim. Thus, that issue was not before the high court, which only addressed whether the underlying evidence before the state trial court supported the issuance of a certificate of appealability. (*Id.* at pp. ___-___ [123 S.Ct. at pp. 1042-1045].)

reviewing court must consider that evidence, along with everything else of relevance, in reviewing, deferentially, the trial court's ruling. When such an analysis was not presented at trial, a reviewing court should not attempt its own comparative juror analysis for the first time on appeal, especially when, as here, the record supports the trial court's finding of no prima facie case. While we decline to prohibit the practice outright, we are hard pressed to envision a scenario where comparative juror analysis for the first time on appeal would be fruitful or appropriate.

D. *The Trial Court's Ruling in This Case*

We have already alluded to the standard of appellate review of a trial court's finding of no prima facie case. Because these rulings call upon trial judges' personal observations, we review them with considerable deference. (*People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890].) Of course, "deference is not abdication . . . ." (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 [65 Cal.Rptr.2d 240, 939 P.2d 354]; see also *Miller-El*, *supra*, 537 U.S. at p. ___ [123 S.Ct. at p. 1041] ["deference does not imply abandonment or abdication of judicial review"].) Accordingly, we review the entire record for evidence supporting the trial court's ruling. But if the record suggests grounds on which the prosecutor might reasonably have challenged the jurors, we affirm that ruling. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1155.)

(5) The record here suggests grounds for the prosecutor to have reasonably challenged these jurors. The trial judge, "who had performed much of and observed the remainder of the voir dire, [and thus] was in the best position to determine under 'all the relevant circumstances' of the case" whether a prima facie showing existed (*People v. Box*, *supra*, 23 Cal.4th at p. 1189), mentioned reasons as to two of the jurors. The court noted that these reasons did not warrant a challenge for cause, but peremptory challenges need not be based on grounds for a challenge for cause. (*People v. Jones*, *supra*, 17 Cal.4th at p. 294.) So far as we can review the court's reasons on

the cold record, the record supports them. Defendant has a different view of the significance of these jurors' answers and courtroom statements, but we see no basis on which to overturn the trial court's determinations.

As the majority below and defendant point out, the trial court did not specifically discuss the third of the challenged jurors, C.T., who was actually the first one challenged. But at trial, defendant did not argue that no reason existed to challenge that juror. His first *Wheeler* motion was "specifically" directed towards the challenge of S.E. His second *Wheeler* motion also never referred to C.T. The court acted reasonably in discussing the arguments defendant made, not arguments he did not make. Moreover, as the dissent below noted, the record discloses race-neutral grounds for challenging C.T.: "(1) she was childless (this case involved the death and alleged abuse of a minor), (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys." (Fn. omitted.) As that dissent also noted, "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417.)

Defendant stresses that the district attorney used three of his 12 peremptory challenges to remove all three African-American prospective jurors, and this case involves an African-American defendant charged with killing "his White girlfriend's child." These circumstances are obviously highly relevant to whether a prima facie case existed. (*Wheeler*, *supra*, 22 Cal.3d at pp. 280-281.) They definitely warranted the trial court's careful scrutiny, which that court gave. The court considered the question close but found no prima facie case under all the circumstances. We will not second-guess its determination by attempting a comparative juror analysis for the first time on appeal.

An additional note about the circumstances of this case is in order. Viewing these circumstances in isolation, it certainly looks suspicious that all three African-American prospective jurors were removed from the jury. But viewing a case like this in isolation is all a reviewing court *can* do. When this issue comes before a reviewing court, the circumstances often will be akin to those here. A reviewing court does not review the ordinary, nonsuspicious cases of jury selection. (Nor does it review those cases in which the trial court *grants* a *Wheeler* motion, so it also never sees those rulings.) A reviewing court does not see the big picture; it cannot place a case like this into perspective. It cannot know whether a case like this is typical, thus suggesting a real problem, or merely a statistical aberration of

the type that will inevitably occur occasionally given such a small sampling. The trial court, however, is capable of seeing the big picture. It can place a specific trial in a county into perspective. Trial judges "'are in a good position to make such determinations . . . on the basis of their knowledge of local conditions and of local prosecutors.'" (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) This is another reason we must, and can, rely on trial courts to determine, from all the relevant circumstances, whether a prima facie case of discriminatory use of peremptory challenges exists.

Defendant cites *Miller-El*, *supra*, 537 U.S. __ [123 S.Ct. 1029], in support of his argument that a prima facie case existed here. In *Miller-El*, the prosecution conceded in the high court that the defendant had established a prima facie case. (*Id.* at p. __ [123 S.Ct. at p. 1040].) But the evidence the defendant presented in that case was far stronger than here. The defendant there presented several types of evidence to the original trial court: (1) the statistical disparity of peremptory challenges of African-Americans (10 of 11 were challenged) compared to others (4 of 31 were challenged); (2) a comparison of the manner in which the prosecution questioned African-Americans and others, which suggested "that the manner in which members of the venire were questioned varied by race" (*id.* at p. __ [123 S.Ct. at p. 1037]); (3) a comparison of the answers of prospective jurors akin to the comparative juror analysis defendant attempts here to present for the first time on appeal (*id.* at p. __ [123 S.Ct. at p. 1043]); (4) the prosecution's use of a procedural practice unknown in California called "jury shuffling," which can be used to manipulate which prospective jurors are actually called;[8] and (5) evidence that the district attorney's office historically had a pattern and practice of racial discrimination in voir dire.

Here, defendant's showing in the trial court consisted primarily of the statistical disparity of peremptory challenges between African-Americans and others. Regarding this type of evidence, *Miller-El* stated that "the statistical evidence alone raises some debate as to whether the prosecution acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutors' 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity." (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1042].) Here, the number of strikes is smaller, and thus perhaps more explainable by happenstance: three of the

[8] "On at least two occasions the prosecution requested shuffles when there were a predominate number of African-Americans in the front of the panel," with the result that the African-Americans were spread out more randomly and thus less likely to be called. (*Miller-El*, *supra*, 537 U.S. at p. __ [123 S.Ct. at p. 1038].)

prosecutors' 12 peremptory strikes were used against African-Americans. In one respect, however, the percentages are even worse: the prosecutor challenged all three (100 percent) of the eligible African-Americans. But the high court did not cite the statistical evidence to show that it alone necessarily established a prima facie case, but only to support the overall conclusion that the merits of the habeas corpus petition were sufficiently debatable that the federal appellate court should have permitted an appeal. Here, both the trial court and this court have considered the issue on the merits. The statistics here are indeed troubling and, as the trial court stated, the question was close, but, for the reasons explained, we see no basis to overturn the trial court's carefully considered ruling.

(6) Defendant and the dissent (dis. opn., *post*, at p. 1340) also argue that the district attorney asked no questions of the African-American jurors he challenged. This circumstance may also be relevant. (*Wheeler*, *supra*, 22 Cal.3d at p. 281.) But this trial occurred in 1998, at a time the trial court had primary responsibility for conducting voir dire. (Code Civ. Proc., former § 223, as added by Prop. 115, approved by voters at Prim. Elec., June 5, 1990.) The district attorney asked no questions of any prospective juror, including the nine of other ethnic groups he also challenged. Thus, asking no questions was of little or no significance here.

III. CONCLUSION

California's reviewing courts are as ready as any to combat the pernicious effects of racial and other improper discrimination, in jury selection as in other matters. (E.g., *People v. Silva* (2001) 25 Cal.4th 345, 386 [106 Cal.Rptr.2d 93, 21 P.3d 769] [reversing a sentence of death because of error as to a single prospective juror].) But, like the United States Supreme Court, we necessarily, yet confidently, rely primarily on the good judgment of our trial courts to make the difficult determinations the procedures established in *Batson*, *supra*, 476 U.S. 79, and *Wheeler*, *supra*, 22 Cal.3d 258, require. The record in this case provides no reason to believe the trial court here failed to perform its duty properly.

Accordingly, we reverse the judgment of the Court of Appeal and remand the matter for further proceedings consistent with our opinion.

George, C. J., Baxter, J., Brown, J., and Moreno, J., concurred.

WERDEGAR, J., Concurring and Dissenting.—I concur in parts I., II.A. and II.C. of the majority opinion. With respect to the proper standard of proof for establishing a prima facie showing under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69], I dissent and join part II of Justice Kennard's dissenting opinion.

KENNARD, J., Dissenting.—A peremptory challenge is presumed to have been based on valid grounds. If a defendant seeks to rebut this presumption, claiming that a prosecutor is improperly using peremptory challenges to remove prospective jurors solely because of group bias, the defendant must first establish a prima facie showing of discriminatory use.[1] (*Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*).) If the trial court finds that a prima facie case has been established, it will ask the prosecutor to explain the basis for the peremptory challenges. If, after hearing the explanations, "the court finds that the burden of justification is not sustained as to any of the questioned peremptory challenges, the presumption of their validity is rebutted . . . and it must dismiss the jurors thus far selected." (*Wheeler*, *supra*, at p. 282.)

This case presents two issues concerning motions based on *Wheeler* and *Batson* objecting to prosecutorial peremptory challenges: (1) Should this court use comparative juror analysis—comparing the challenged jurors with others who were not challenged—in reviewing the trial court decision that defendant had failed to establish a prima facie showing that the prosecutor's challenges had a discriminatory purpose? (2) What must a defendant prove to make that initial prima facie showing of discriminatory purpose? On the first question, the majority relies on *People v. Johnson* (1989) 47 Cal.3d 1194 [255 Cal.Rptr. 569, 767 P.2d 1047], to hold that an appellate court ordinarily should not use comparative jury analysis in reviewing a trial court's denial of a *Wheeler-Batson* motion if the defendant has not raised that analysis in the trial court. I agree with that result, but would reach it by a different route. On the second question, the majority upholds the trial court's ruling finding no prima facie case on the ground that defendant failed to show that it is more likely than not that the peremptory challenges had a discriminatory purpose. I disagree with this standard, and would hold that a defendant need only prove facts that, if unexplained, permit a reasonable inference of discriminatory purpose. Even without using comparative juror analysis, the record here shows that defendant met that standard.

[1] I speak of a prosecutor's use of peremptory challenges and a defendant's objection because this case, like both *Wheeler* and *Batson*, arose in that factual setting. The principles of those decisions, however, also apply to peremptory challenges by a criminal defendant (*Georgia v. McCollum* (1992) 505 U.S. 42 [112 S.Ct. 2348, 120 L.Ed.2d 33]) and to challenges by parties to civil cases (*Edmonson v. Leesville Concrete Co., Inc.* (1991) 500 U.S. 614 [111 S.Ct. 2077, 114 L.Ed.2d 660]).

I

Comparative juror analysis involves comparing the challenged jurors to jurors who were not challenged to determine whether a proffered reason for a challenge is genuine or pretextual. For example, if the prosecution says it challenged juror A for not having a high school education, it would be of interest whether the prosecution challenged jurors B and C who also lack that education. If the prosecutor did, that would suggest that the proffered ground for challenge was genuine; if not, it would suggest there was probably some other reason for the challenge to juror A. Here, the trial court found defendant had not established a prima facie showing that the prosecutor's challenges had a discriminatory purpose because, in the court's view, the record showed neutral reasons why the prosecutor might have challenged the jurors in question. The defense could have used comparative juror analysis to question those reasons, but it did not do so. By failing to use comparative juror analysis in the trial court, the defense not only deprived the prosecution of the opportunity to explain the pattern of its preemptive challenges to the trial court, but it also deprived the trial court of the opportunity to evaluate that explanation in the context of the voir dire the court observed.

It is well settled that ordinarily an appellate court will not consider a theory not raised at trial. (See generally 1 Appeals & Writs in Criminal Cases (Cont.Ed.Bar 2d ed. 2000) § 1.165, pp. 164.2-165, and cases there cited; Erwin et al., Cal. Criminal Defense Practice (2002) § 101.35, pp. 108-112 and cases there cited.) "The general rule confining the parties on appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534].) There are many examples. (See, e.g., *People v. Carrera* (1989) 49 Cal.3d 291, 324 [261 Cal.Rptr. 348, 777 P.2d 121] [appellant cannot raise new ground for claiming evidence was inadmissible]; *People v. Raley* (1992) 2 Cal.4th 870, 898 [8 Cal.Rptr.2d 678, 830 P.2d 712] [constitutional contention cannot be raised on appeal when issue was argued only on statutory grounds in the trial court].) Because defendant here failed to use comparative jury analysis in the trial court, this rule precludes defendant from arguing that theory on appeal.

The majority reaches the same conclusion, but instead of basing that conclusion on well-settled principles of appellate review, it relies on a

were ones in which the trial court called for, received and accepted a race-neutral explanation from the attorney whose challenges were questioned. The important question in those cases was not whether a prima facie case of group bias had been established, but whether counsel's explanation was credible. The Supreme Court admonished against the excessive appellate use of comparison analysis in those cases because it related to the ultimate determination of bias and could not be squared with the deference that had to be accorded a trial court determination of the credibility of a proffered explanation. For example, in *People v. Montiel*, the prosecutor analyzed the views of challenged and unchallenged members of the venire and the trial judge made a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications he offered. "In such circumstances," the Supreme Court stated, "an appellate court will not *reassess* good faith by conducting its own comparative juror analysis." (5 Cal.4th at p. 909, italics added.) A very different situation is presented, however, where, as in the matter before us, the trial judge neither received from counsel nor itself provided any racially neutral explanation but nonetheless refused to find a prima facie case of group bias. The issue here is neither the credibility of a racially neutral explanation nor the ultimate question of bias, but merely the *appearance* of such bias as would *call* for an explanation. Where reasons for a questioned challenge are not required by the trial court or offered by counsel, a reviewing court will often be unable to reasonably determine whether the *Wheeler* rule has been violated without some examination and comparison of the voir dire testimony of excluded and nonexcluded jurors. Barring *any* appellate use of such comparisons in those cases would materially compromise the ability of reviewing courts to intelligently evaluate the denial of *Wheeler/Batson* claims. In light of the importance of appellate review to a correct criminal adjudication (*Griffin v. Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 590, 100 L.Ed. 891, 55 A.L.R.2d 1055]), inadequate state appellate review might undermine the presumption of the correctness of state court rulings indulged by federal courts in habeas corpus proceedings (28 U.S.C. § 2254(d)), and leave to the federal courts the enforcement of an important right arising not just under the United States Constitution but independently under our own Constitution. (See *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428.)

We do not think our Supreme Court contemplates any abdication of state judicial responsibilities. *Wheeler* implicitly acknowledges that the exclusion of jurors on the basis of race "condones violations of the United States Constitution [and our own Constitution] within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." (*Powers v. Ohio* (1991) 499 U.S. 400, 412 [111 S.Ct. 1364, 1371, 113 L.Ed.2d 411].) In the light of this

danger, judges must be vigilant and assertive. As stated in *Wheeler*, "the courts cannot be pacifists" in the "war" between racial discrimination in jury selection and our basic concepts of a democratic society. (*People v. Wheeler*, *supra*, 22 Cal.3d at p. 280.) The *Wheeler* rule is meaningless unless a trial court finding that a prima facie case of racial or group bias has not been established is subject to meaningful review. Where such a finding is unexplained by the trial court or by counsel, a reviewing court must be able to examine all the relevant evidence, including a comparison of the voir dire testimony of excluded and nonexcluded jurors.

It is also necessary to remember that *People v. Howard*, *supra*, 1 Cal.4th 1132, 1155 states that judicial review of a defendant's attempt to establish a prima facie case is not limited to a review solely of counsel's presentation at the time of the motion in order to ensure that even if the defendant's showing is inadequate, there are no "other circumstances" which might support a finding of a prima facie case. Courts of Appeal have lamented that by relieving trial courts of the need to provide a rationale for a no prima facie case finding, and requiring appellate courts to examine the entire record in search of a justification, the Supreme Court has in effect compelled reviewing courts "to move into the realm of speculation concerning why a party 'may' have a reason to challenge a juror other than his or her membership in a cognizable group." (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409 [64 Cal.Rptr.2d 61].) As one court has stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard*, is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker*, *supra*, 64 Cal.App.4th 1062, 1069; accord, *People v. Buckley*, *supra*, 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror."].) Needless to say, the problem created by *Howard* would be immeasurably exacerbated, and it would be irrational and unfair, if a comparison of the voir dire testimony of challenged and unchallenged members of the venire were excluded from the "other circumstances" reviewing courts have been required by the Supreme Court to examine.

For the foregoing reasons, we conclude that in a case such as this a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not "one-sided," "highly speculative" or "unduly emphasized" (*People v. Johnson*, *supra*, 47 Cal.3d at pp. 1220-1221), but solid and persuasive.

(4) With these thoughts in mind, we proceed to consider the voir dire testimony and other evidence appellant relies upon in arguing that the trial court erred in finding he did not establish a prima facie case of group bias. We preface our analysis, however, by noting that the prosecution's use of peremptory challenges removed all African-Americans from the jury, and in *People v. Sanders*, *supra*, 51 Cal.3d at page 500, the Supreme Court indicated that this *alone* "may give rise to an inference of impropriety." (Accord, *U.S. v. Chinchilla*, *supra*, 874 F.2d 695, 698, fn. 4; *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257; *U.S. v. Alcantar* (9th Cir. 1987) 832 F.2d 1175, 1177.)

Clodette T.

Clodette T.'s juror questionnaire revealed she was 42 years old, had been divorced for 11 years, had no children, and had lived in Richmond for 10 years. She had been employed in an administrative job at IBM for nine years, had attended some regular college and was a graduate of business college. She had served on a civil jury in a medical malpractice case, and that jury had reached a verdict. This was a positive experience for her. Question 20 asked, "Do you have a favorable, neutral, or unfavorable opinion of your African-American or black co-workers?" She responded: "Being an African-American myself, I am favorable." None of her other answers contained information that would give pause to either side.

During oral questioning, Ms. T. stated that her house had been "robbed" five or six years ago and that no arrest had been made for it. In examining Ms. T.'s questionnaire, the trial court noted that she had omitted answers to questions 57 and 58 (out of a total of 64 questions, spanning 17 pages) asking for her opinions about prosecuting attorneys and criminal defense attorneys. Ms. T. said she made a mistake in omitting answers to those questions, but did so only because she had no opinions on those topics. In the six or so other questions asked, Ms. T. gave no answer that would provide a race-neutral reason for finding her unsuitable as a juror. Indeed, the court asked only 10 questions in all, and the prosecutor declined the court's invitation to ask follow-up questions.

No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by White Juror No. 7 (questionnaire No. 50) who also explained he had no opinions on the subject of those questions, and by White Juror No. 10 (questionnaire No. 89).

Ms. T.'s answer to question 20 that she had a favorable opinion of African-American coworkers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White Juror No. 3 (questionnaire No. 47), Hispanic/Latino juror No. 6 (questionnaire No. 78), and White Juror No. 8 (questionnaire No. 10) all answered that they had favorable opinions of their African-American coworkers, and none were challenged by the prosecutor.

Sara E.

Sara E.'s questionnaire revealed that she was 36 years old, had never been married, and had lived in West Contra Costa County for 19 years. She had worked for Pacific Bell for 13 years, performing wiring for telephone service. Her car had been broken into five years before. She had served on a criminal jury in a robbery case in the early 1980's and that jury had reached a verdict. Question 63 asked a prospective juror whether filling out the questionnaire changed his or her attitude in any way about sitting as a juror in this case. She wrote: "I had no feelings one way or the other about sitting as a juror until I found out who the victim was. I am deeply saddened that it was an eighteen month old child. Based on the evidence brought forward, I will not allow my emotions to get in the way of the verdict." (Underscoring in original.)

During questioning on voir dire, the court mentioned that Ms. E. had failed to answer question 30, which asked whether she or a family member had ever been arrested. Ms. E. responded that one of her parents had been arrested for robbery in another location over 35 years ago. As previously mentioned, Ms. E. was 36 years old. She knew nothing about how the police or district attorney had treated her parent.

Written question 40 inquired whether the fact that this case involved an allegation of murder and child abuse of an 18-month-old child would affect the juror's ability to be fair and impartial. Ms. E. wrote "don't know." The court asked how she felt about that now, and she replied that she could be fair and impartial.

Declining the court's explicit invitation to ask follow-up questions, the prosecutor immediately challenged Ms. E. At that point, defense counsel made his first *Wheeler* motion.

With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) she failed to answer question 30 on

the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have caused concern.[4] The court stated: "Even through the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence."

Appellant contends that this explanation for the court's refusal to find a prima facie case of group bias ignores and is inconsistent with several highly relevant circumstances. He argues, first, that omitting an answer on a 17-page, 63-item questionnaire could not possibly be deemed a legally valid, race-neutral reason for challenging Ms. E. in light of the fact that White members of the venire who failed to answer questions served on the jury without objection from the district attorney.

The arrest of Ms. E.'s parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several Whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror No. 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate Juror No. 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge.

Appellant argues that the trial court mischaracterized Ms. E.'s written response "don't know" to question 40, which inquired whether there was anything about the nature of the charges that caused her to question her ability to be fair and impartial. The court characterized this answer as saying Ms. E. didn't know if she could be fair. But this discounts Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial. Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors, both female and male, also indicated abhorrence of child abuse but, like Ms. E., later orally affirmed

[4]In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28: "Do you have any legal training or have you taken any law courses?" The same answer was given by Juror No. 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas Juror No. 11 was questioned at length about her legal training and experience (prelaw as an undergraduate; worked at law firm in high school and college).

that they could nonetheless be fair and impartial, and were not challenged by the prosecution.

Considering the record in its entirety, and giving particular weight to the considerations our Supreme Court identified as relevant in *Wheeler*,[5] we determine that appellant established a prima facie case that the prosecution's use of peremptory challenges to excuse Clodette T. and Sara E. reflect group bias.[6] The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group (3 out of 3 or 100 percent of the African-Americans, versus 9 out of 40 or 22 percent of the other prospective jurors);[7] completely excluded African-Americans from the jury; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a *Wheeler* violation. In addition, two of the three African-American members of the venire (Sara E. and Ruby L.) were peremptorily challenged immediately after the trial court completed its routine questioning. Finally, as earlier discussed, the record is bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of Clodette T. and Sara E., or anything else in the record, significantly differentiates them from members of the venire who served on the jury. Nor is there anything in their testimony suggesting they would be hostile to the prosecution; indeed, as the court observed, Sara E.'s answers "tend to lean in favor of the prosecution." We are, in short, unable to find any basis in the record for the trial judge's stated conclusion that "[t]he People are not exercising challenges based on group bias, rather than individual bias."

It appears to us that the court's determination that appellant failed to establish a prima facie case of group bias was based not on the existence of

[5]With respect to the type of evidence that may be used to establish a prima facie case of group bias, the *Wheeler* court stated that the moving party "may show [1] that his opponent has struck most or all of the members of the identified group from the venire, or [2] has used a disproportionate number of his peremptories against the group. [3] He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. [4] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or to ask them any questions at all." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted.)

[6]A new trial is required if there was a prima facie case of a *Wheeler* violation as to *even one* of a cognizable group of prospective jurors. (*People v. Montiel, supra*, 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4 [286 Cal.Rptr. 792, 818 P.2d 75].) Accordingly, our finding of a prima facie case as to Ms. T. and Ms. E. makes it unnecessary to review the validity of the peremptory challenge to Ruby L., the third and last potential African-American juror, who the trial court seemed to believe might be unable to fully understand the proceedings.

[7]The prosecutor exercised a total of 12 peremptory challenges, defense counsel exercised 16 such challenges.

a persuasive race neutral explanation—because neither the district attorney nor the court produced such a reason—but on the belief that the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. But, as we have explained, that theory, which is at the heart of the opinion in *People v. Bernard, supra*, 27 Cal.App.4th at page 465, has been repudiated by the Supreme Court. For purposes of establishing a prima facie case of a *Wheeler* violation, an inference is "reasonable," or a likelihood "strong" if the record provides no *apparent* race-neutral reason for exercising a peremptory challenge. That is the case here.

The trial court's refusal to find a prima facie case ended the inquiry before the prosecutor would have been required to provide justification for his challenges. If the prosecutor had a reasonable race neutral explanation for peremptorily challenging these two members of the venire, it simply does not appear in the record. When, as here, no prima facie case is found and thus no explanation given, the reviewing court is left to speculate about possible explanations which, in this case, are not readily apparent. It may reasonably be inferred from the record that the district attorney excluded Clodette T. and Sara E. because of their race, as that is the only discernible difference between these members of the venire and those who served on the jury. As earlier noted, in reviewing California trial court compliance with *Wheeler*, which it treats as the functional equivalent of *Batson* (*McClain v. Prunty, supra*, 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Page, supra*, 182 F.3d 677, 679 (en banc)), the Ninth Circuit has repeatedly declared that peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." (*McClain v. Prunty, supra*, 217 F.3d at p. 1221; *Turner v. Marshall, supra*, 121 F.3d 1248, 1251.) That test has not been met in this case. By unjustifiably relieving the district attorney of the responsibility to provide a race-neutral explanation for these exclusions, the trial court abused its discretion and a new trial is therefore required. (*People v. Montiel, supra*, 5 Cal.4th at p. 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 716, fn. 4.)

This might easily have been avoided. "The procedure designed in *Wheeler* to prevent racial discrimination in jury selection, and preserve public confidence in our courts, is not onerous. Ordinarily it takes but a few moments for a party who uses a peremptory challenge to explain why an objecting adversary has failed to establish a prima facie case or, if the court finds a prima facie case has been established, to provide a racially neutral explanation for the challenge if this can be done. Trial courts should not lightly relieve counsel of these important responsibilities, either by too readily

accepting vague explanations (see Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* (1990) 76 Cornell L.Rev. 1 at pp. 97-98; Bell, Race, Racism and American Law (3d ed. 1992) § 5.16.4, p. 383) or, as appears to have occurred here by elevating the 'strong likelihood' standard to a level that can rarely be met by trial counsel, who are ordinarily in the difficult position of having to prove a negative, and must do so without the opportunity for preparation in advance under the considerable pressures imposed by trial proceedings." (*People v. Buckley, supra*, 53 Cal.App.4th at pp. 681-682 (dis. opn. of Kline, P. J.), fn. omitted.)

II.*

. . . . . .

III.

DISPOSITION

The judgment is reversed.

Lambden, J., concurred.

HAERLE, J.—For at least four different reasons, I respectfully but strongly dissent.

1. First of all, the majority apparently believes that footnote 7 in our Supreme Court's opinion in *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] (*Box*), signals a major shift from its previous position regarding the applicable test under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*). I disagree; clearly, all our Supreme Court was saying by that footnote was: "these two terms mean the same thing to us and always have, so what's all the fuss about?"

That fuss was, as the majority suggests, the result of an opinion of a panel of the Court of Appeals for the Ninth Circuit, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190 (*Wade*). While affirming a lower court's denial of a

*See footnote, *ante*, page 318.

petition for a writ of habeas corpus, *Wade* spent considerable space gratuitously suggesting that past California Supreme Court opinions had differentiated between the two standards and had, erroneously, applied only the "'strong likelihood'" standard.[8] (*Wade, supra*, 202 F.3d at pp. 1195-1198.)

The *Wade* opinion appeared in print in February 2000, after *Box*, a capital case, had been fully briefed.[9] Obviously, our Supreme Court wanted to promptly reassure the lower courts of this state that, the Ninth Circuit panel to the contrary, it knew what it was doing regarding the *Wheeler/Batson* standard, and it opted to do so in both a prompt and succinct way via footnote 7 of *Box*. The majority treats this as some sort of major event. This is plainly incorrect. Indeed, the court specifically noted in that footnote (as, also, had the Ninth Circuit panel in *Wade*) that even as early as *Wheeler* (which, of course, preceded the United States Supreme Court's *Batson* decision by eight years), *both* terms were used synonymously within a page of one another. (See *Wheeler, supra*, 22 Cal.3d at pp. 280-281; *Wade, supra*, 202 F.3d at p. 1196.)

The long and short of all this is that, the majority of this court and *Wade* to the contrary, our Supreme Court has been using the *Batson* standard all along, and footnote 7 in *Box* did not signal any change on that issue. Additional proof of that fact came in an opinion authored by Justice Mosk and filed a few days after *Box*. (*People v. Ayala* (2000) 24 Cal.4th 243, 260 [99 Cal.Rptr.2d 532, 6 P.3d 193].) As the majority points out in its footnote 3, in the course of that decision the court quoted from *Box* and, in so doing, put the term "reasonable inference" in brackets after the term "strong likelihood." I don't know how that court could have signaled more emphatically that, in its view, the two terms do now, and always have, meant the same thing.

The majority, however, is obviously not persuaded. Relying upon various and sundry dictionary definitions of the relevant terms and, even more

[8]The extended essay offered by the Ninth Circuit panel was unnecessary to its result because it ultimately affirmed the federal district court's denial of a petition for a writ of habeas corpus. That denial and affirmance brought to an end an attack on the Contra Costa Superior Court's handling of a *Wheeler* motion set forth in detail in our decision in *People v. Buckley* (1997) 53 Cal.App.4th 658 [61 Cal.Rptr.2d 860] (*Buckley*). In *Buckley*, with Presiding Justice Kline dissenting, we upheld the trial court's ruling that that appellant had not established a prima facie case that the prosecution's challenges were based on race. Our Supreme Court denied review in *Buckley* (see 53 Cal.App.4th at p. 683), and our opinion has been cited several times by other appellate courts dealing with appeals of *Wheeler* challenges. (See *People v. Walker* (1998) 64 Cal.App.4th 1062, 1069 [75 Cal.Rptr.2d 871]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409-410 [64 Cal.Rptr.2d 61] and *Birdine v. Hubbard* (N.D.Cal. Aug. 21, 2000, No. C 99-037 MJJ) 2000 WL 1229112, p. 3, the latter being a post-*Wade* denial of a petition for a writ of habeas corpus sought on *Batson* grounds.)

[9]Appellant's reply brief in *Box* was filed January 24, 2000.

importantly, repeated citations to federal, especially Ninth Circuit, authority, the majority contends, at least as I understand matters, that both the *Box* footnote and the bracketed phrase in *Ayala* are substantially inexplicable.[10]

I remind my colleagues in the majority that, their strong and honest feelings notwithstanding, we are an intermediate appellate court that is bound to follow the rulings of our Supreme Court, even those we feel are not adequately explained. Thus, and because I have no difficulty understanding the (admittedly cursory) *Box* footnote, I think the majority errs in not following its clear direction.

2. Most unfortunately in my view, the majority opinion gives only lip service to the principle that an appellate court should pay deference to a trial court's ruling on a *Wheeler/Batson* motion. The majority briefly alludes to this principle (maj. opn., *ante*, at pp. 328-329), but immediately thereafter proceeds to pay no deference whatsoever to the trial court's ruling.

And it is not as if the direction to pay such deference has been vague: our Supreme Court has repeated it practically every time a *Wheeler* issue has been before it—which is a lot of times. Indeed, in the important case of *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 [255 Cal.Rptr. 569, 767 P.2d 1047] (*Johnson*), where the court disapproved of an earlier effort to modify the *Wheeler* standard (*People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719]), the standard was articulated as one of "truly giving great deference" to the trial court. (*Johnson*, *supra*, 47 Cal.3d at p. 1221.) Most recently, in *People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890], the court stressed that "'"'[b]ecause *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal.'"'" To the same effect are the court's holdings in *People v. Howard* (1992) 1 Cal.4th 1132, 1155 [5 Cal.Rptr.2d 268, 824 P.2d 1315], *People v. Crittenden* (1994) 9 Cal.4th 83, 117 [36 Cal.Rptr.2d 474, 885 P.2d 887], and *People v. Mayfield* (1997) 14 Cal.4th 668, 723 [60 Cal.Rptr.2d 1, 928 P.2d 485]. Even the United States Supreme Court, in its *Batson* opinion, pointedly acknowledged this principle. It said: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson*, *supra*, 476 U.S. at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

[10]The majority also contends that, previously, the court differentiated between the concepts of "strong likelihood" and "reasonable inference." It argues that in *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 [273 Cal.Rptr. 537, 797 P.2d 561] (*Sanders*), the court expressed "the belief that a 'strong likelihood' of group bias requires greater evidence than a 'reasonable inference' of such bias . . . ." (Maj. opn., *ante*, at p. 327.) This is simply incorrect. The Supreme Court said no such thing and, indeed, the term "reasonable inference" nowhere appears in the cited pages of *Sanders*.

Our Supreme Court elaborated on this rationale for the required deference in *Sanders*, *supra*, 51 Cal.3d 471: "We reiterate that ruling on *Wheeler* motions '"requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim . . . .' (*Wheeler*, *supra*, 22 Cal.3d at p. 281, quoting Kuhn, *Jury Discrimination: The Next Phase* (1968) 41 So.Cal.L.Rev. 235, 295, fn. 5; see also *Johnson*, *supra*, 47 Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, 'we see no good reason to second-guess [the trial court's] factual determination' (*Johnson*, *supra*, at p. 1221) that the prosecutor was not motivated by bias against Hispanics." (*Sanders*, *supra*, 51 Cal.3d at p. 501.)

So, how much deference does the majority pay to this trial court's "powers of observation" which necessarily impact its "evaluation of credibility," its "understanding of trial techniques," or its "broad judicial experience"? The answer is disturbing: aside from a single mention of the word "deference" (maj. opn., *ante*, at p. 328), none at all. Thus, the majority (1) totally avoids the trial court's careful statement of its reasons for concluding that no prima facie case of discrimination was shown by the prosecution's peremptory challenge of Prospective Juror Ruby L. (maj. opn., *ante*, at p. 336, fn. 6) and (2) totally reevaluates, as if it were the trial court itself, the validity of that court's reasons for coming to the same conclusion regarding Prospective Juror Sara E. (maj. opn., *ante*, at pp. 334-336).

The apogee of the majority's second-guessing of the trial court regarding that potential juror concerns that court's verbal inquiry as to whether, in light of Sara E.'s ambiguous answer to a questionnaire inquiry, she could be fair and impartial. The majority says that the trial court "discount[ed] Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial." (Maj. opn., *ante*, at p. 335.) But it was *the trial court and not the majority* that saw and heard the answer from Ms. E. to its question and, therefore, *it is for that court and not us* to evaluate what weight, if any, to give to that answer. That is what the United States Supreme Court had in mind when it noted the ability of trial courts to "evaluat[e] . . . credibility" (*Batson*, *supra*, 476 U.S. at p. 98, fn. 21 [106 S.Ct. at p. 1724]) and what our Supreme Court meant when it observed that trial courts have necessarily unique "'powers of observation.'" (*Sanders*, *supra*, 51 Cal.3d at p. 501, quoting *Wheeler*, *supra*, 22 Cal.3d at p. 281.)

3. Having substantially disregarded the principle of deference, the majority compounds its error by then indulging in a multitude of comparisons of the questionnaire answers of two of the three challenged jurors to those of prospective jurors of other races.

To its credit, the majority appreciates that it is navigating in, as far as California is concerned, uncharted water. It recognizes that appellant's challenge "rests in some measure [I would have said 'almost entirely'] on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by the California courts has differed somewhat from federal judicial application of *Batson*." (Maj. opn., *ante*, at p. 329.) The majority then goes on to indicate, once again, its clear preference for the federal approach, especially that espoused by the Ninth Circuit.

There is, the majority's implication to the contrary, nothing ambiguous about our Supreme Court's view of such comparative analyses. It has repeatedly admonished that such comparisons should not be undertaken by an appellate court. For example, in *People v. Turner* (1994) 8 Cal.4th 137 [32 Cal.Rptr.2d 762, 878 P.2d 521], in rejecting an appellant's challenge to a trial court finding of no prima facie case of discrimination, the Court said: "Defendant argues, however, that this basis was insufficient here because the prosecutor did not excuse other non-Black jurors who displayed similar intellectual limitations. However, we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. [Citation.] [¶] . . . Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.' " (*Id.* at pp. 169-170.) More recently, the court said precisely the same thing in *Box* (23 Cal.4th at p. 1190), also in the context of a prima facie ruling. (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 715 [286 Cal.Rptr. 792, 818 P.2d 75].)

The majority tries to avoid this rule by three patently fallacious devices. First of all, it interprets the "undue emphasis" phrase in the quoted passage from *Turner* as an invitation to put its foot in that door and try to open it further. In so doing, it carefully avoids discussing language in Supreme Court cases that make clear that the prohibition is *absolute*. Thus, in *People v. Montiel* (1993) 5 Cal.4th 877 [21 Cal.Rptr.2d 705, 855 P.2d 1277] (*Montiel*), the court stated: "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. *In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis.* Such an approach would undermine the trial court's credibility determinations and would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*Id.* at p. 909, italics added.)

Quoting this passage, the court said even more recently: "Just as an appellate court *will not* compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. '[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial.' [Citation.] Moreover, as we have indicated, such an analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980] (*Arias*), italics added.)

I suggest that two recent doses of "will not" from our Supreme Court cannot, the majority to the contrary, translate into "may."[11]

Second, the majority argues that our Supreme Court's concern about comparative analyses obtains only in those cases where the prosecutor was either asked for or volunteered explanations concerning the questioned challenges, but does not apply in cases, such as this, where no such explanation was asked for or given. But there is absolutely no language in any of the cases cited by the majority even implying any such distinction. Indeed, several of the more recent cases containing the admonition against appellate courts engaging in comparative analyses were cases in which the trial court had ruled that no prima facie case had been established. (*Box, supra,* 23

[11]The majority carefully avoids discussing the "will not" language in *Montiel* and *Arias*, and doesn't even cite the latter case. It demonstrates its inattention (to be generous) to the language used in them by saying that "our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an '*undue emphasis*' on such an analysis." (Maj. opn., *ante*, p. 330; majority's italics.) The majority to the contrary, I think the phrase "will not" is a pretty good hint of an intent to "preclude."

Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at pp. 169-170.) Indeed, the only case relied upon by the majority where the admonition against comparative analyses *did not* arise in the context of a challenge regarding a prima facie case was *Johnson, supra,* 47 Cal.3d at page 1220.[12] This fact, plus the unequivocal statements in *Montiel* and *Arias,* combine to demolish the distinction so laboriously constructed by the majority.

Third, the majority suggests that perhaps our Supreme Court doesn't really mean what it says regarding comparative analyses because, in two decisions, the court itself indulged in comparisons. The majority is flatly wrong. The passage from *People v. Crittenden, supra,* 9 Cal.4th at page 119, which the majority contends reveals an inconsistency in the court's application of this rule (maj. opn., *ante,* at p. 330) does no such thing. As a simple reading of it demonstrates, the court was simply noting that Crittenden's "comparison" argument was not even worth debating because (1) all but one of the non-African American prospective jurors who expressed doubt about the death penalty were also excused by the prosecution and (2) the only one who wasn't was called "later in the proceedings, when the prosecutor's remaining challenges were few."[13]

The majority also suggests that a few sentences in *People v. Jones, supra,* 17 Cal.4th at page 295, demonstrate that the court endorses comparative analyses. (Maj. opn., *ante,* at p. 330.) It is, I believe, constructive to quote the two sentences the majority relies upon: "The implication [of the defendant's argument] is that the Black prospective jurors were singled out for special scrutiny. On this record, however, we are constrained to disagree. There is evidence to support the court's rulings on the four Black prospective jurors in question, enough to reject the defendant's claims of *Wheeler* error." (17 Cal.4th at p. 295.)

I simply do not understand how the majority can conclude from these three plain vanilla sentences that, contrary to its repeated and emphatic

[12]Both *Montiel* and *Arias* are unclear regarding the precise procedural context of their rulings. In *Montiel,* the trial court asked the prosecutor for his reasons without indicating one way or the other if it felt the defense had made a prima facie showing. (*Montiel, supra,* 5 Cal.4th at pp. 907-910.) However, the court hinted that, in such circumstances, it might infer a finding of a prima facie case (*id.* at p. 910, fn. 8). In *Arias,* there was no such inference because the trial court indicated it has "questions" about the defense's prima facie showing (indeed, the court itself had doubts if such had been shown); nonetheless, the prosecutor was asked for and gave his explanations. (*Arias, supra,* 13 Cal.4th at pp. 133-139.)

[13]In fact, in *Johnson, supra,* 47 Cal.3d at page 1220, the court specifically noted, by way of support for its anticomparison stance, that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge . . . ." *Crittenden,* in the passage quoted by the majority, was simply adopting this *additional reason for avoiding comparative analyses.*

words in many other decisions, our Supreme Court in fact approves of comparative analyses of the handling of prospective jurors. Since its emphatic disapproval of the comparative analysis system espoused (and indeed undertaken) by the majority in *People v. Trevino, supra,* 39 Cal.3d 667 (see *Johnson, supra,* 47 Cal.3d at pp. 1220-1221), our Supreme Court's position has been unwaveringly negative on that subject. I hope very much that the majority in this case is not suggesting that we should return to the *Trevino* era of wholesale appellate adjudication on this subject. That is, nonetheless, the effect of its opinion. For that reason, if no other, I strongly urge the Supreme Court to grant review of the majority's decision.

4. Finally, I submit that the record before us contains ample justification for the trial court's ruling that no prima facie case had been established. It will be recalled that the ultimate ruling by the trial court under review here was as to the second defense *Wheeler* motion. That motion encompassed the prosecutor's peremptory challenges to three African-American jurors, Ruby L., Sara E., and Clodette T. The trial court made specific comments on the record regarding the apparent justifications for the challenges to the first two, Ruby L. and Sara E. It made no specific comment regarding Clodette T.

The majority takes these three in reverse order. As far as Ruby L. is concerned, it seems to believe that the trial court's ruling regarding her is almost irrelevant. It buries its only reference to that ruling in a footnote 20 pages into its opinion (maj. opn., *ante,* at p. 336, fn. 6), even though appellant specifically made it a part of his appeal. The majority simply says that, as to this prospective juror, "the trial court seemed to believe [she] might be unable to fully understand the proceedings." (maj. opn., *ante,* at p. 336, fn. 6.) A slight understatement, I suggest; the trial court not only "seemed to believe" this, it clearly did and it was clearly right.

In addressing the challenge to this juror, which precipitated the second *Wheeler* motion, the trial court noted, among other things, that (1) "the Court had concerns with regard to her qualifications in this matter based upon her answers to the questionnaire," (2) Ruby L. had a sister who "had had drug charges," (3) "she herself felt that she had difficulty understanding things," and (4) her "answers on the questionnaire . . . would have justified a peremptory challenge by either side . . . ."[14]

In short, Ruby L. was a hopeless prospective juror from the prosecution's standpoint, and the trial court was clearly correct in ruling that its challenge

[14]The trial court was obviously referring to Ruby L.'s answers to such questions as 37(c), 38-40, and 61. In these, she admitted that, e.g., she could not follow instructions to judge the credibility of all witnesses, including peace officers, by the same standards, could only commit to "try" to follow CALJIC No. 1.00 "regardless of the consequences," and was not sure that she could be fair, given the nature of the charges and circumstances of the case.

of her neither raised nor contributed to the raising of a prima facie *Wheel* issue. But the majority omits all this and, in so doing, does a grave injusti to the trial court. We are, after all, reviewing *the entirety* of its ruling on t *Wheeler/Batson* issue. Put another way, the issue before us is, was the tri court correct in finding, *as to these three African-American jurors*, that prima facie violation of *Wheeler* had been shown? But, apparently, becau the record as to one of those three so clearly supports the trial court's ruli and, conversely, undermines the majority's position, that portion is co signed to the near-oblivion of a footnote and, even there, half-hearted explained. I think this is quite inappropriate. Appellate courts regularly gi parties to appeals before them a hard time when they cite only the favorabl to-them parts of the record. We should pay a trial court at least the respect reciting the *full and complete basis* of its ruling before reversing it.

As to the remaining two prospective jurors, the majority paints with broad brush by proclaiming that "the record is bereft of any race-neutr explanation for these challenges." (Maj. opn., *ante*, at p. 336.) The majo ty's own opinion shows that this is utterly wrong; most of the preceding fo pages of its opinion are devoted to quarreling with the trial court over t proper weight to be placed upon and interpretation given to (1) Sara E failure to answer question 30 regarding whether either she or a fami member had ever been arrested, (2) the fact that one of her parents had, fact, been arrested for robbery, (3) her "don't know" answer to a writt question as to whether the fact that the case involved allegations of murd of a minor and child abuse would affect her ability to be fair and imparti

But the strongest basis for the peremptory challenge to Sara E. came fr her reluctant responses to the trial court's questioning of her regarding h failure to answer question 30 on the questionnaire. That revealing dialog went like this:

"THE COURT: . . . You or anybody close to you ever been arrested?

"Ms. E.: I can answer that.

"THE COURT: Was it you or someone else?

"Ms. E.: Someone else.

"THE COURT: How is that person related to you?

"Ms. E.: Parent.

"THE COURT: What was the person arrested for?

"Ms. E. I believe it was robbery.

"THE COURT: Was that in this county or someplace else?

"Ms. E.: Someplace else.

"THE COURT: And how long ago are we talking about?

"Ms. E.: Over thirty-five years ago."

In short, it took *six* questions from the trial court to elicit a full and complete answer to question 30 on the questionnaire. I respectfully suggest that, after that series of questions and answers, any prosecutor who opted to leave Sara E. "in the box" ought to consider a different career.

Also present in the record, although not cited by the trial court,[15] is the fact that Sara E. had had "legal training," clearly a "race-neutral" reason for rejecting a prospective juror. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 119.) Additionally, and as noted by the majority, she stated in answer to one of the written questions that, although she would "not allow my emotions to get in the way of the verdict," she was "deeply saddened that [the victim in the case] was an eighteen month old child." I suggest that clearly there were more than ample reasons for the prosecution to peremptorily challenge Sara E. and that, by so doing, it did not raise a prima facie case of race discrimination.

Which leaves only Clodette T. As noted both above and by the majority, the trial court made no mention of its views regarding her in its ruling that no prima facie case had been shown. But a review of the record discloses, again as noted by the majority, that (1) she was childless (this case involved the death and alleged abuse of a minor),[16] (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys.

I submit that, giving the required deference to the trial court, it could reasonably have found that, considered together with the ample justifications

[15]We are, of course, permitted to review the record for " 'grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People v. Howard, supra,* 1 Cal.4th at p. 1155; see also our opinion in *Buckley, supra,* 53 Cal.App.4th at p. 667.)

[16]A Ninth Circuit case the majority omits from its encomiums to that court says that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417, cert. den. *Lewis v. United States* (1988) 488 U.S. 923 [109 S.Ct. 304, 102 L.Ed.2d 323].)

in the record for the challenges to Ruby L. and Sara E., the challenge t Clodette T. did not, either alone or in combination with the others, present prima facie case of a violation of *Wheeler*.

[No. A085450. First Dist., Div. Two. Apr. 5, 2001.]

THE PEOPLE, Plaintiff and Respondent, v.
JAY SHAWN JOHNSON, Defendant and Appellant.

[Opinion certified for partial publication.*]

[Reprinted without change for tracking pending review and disposition by the Supreme Court.]

SUMMARY

Defendant was convicted by a jury of second degree murder and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab). Earlier, the trial court denied defendant's two motions for a mistrial, finding that defendant, an African-American, did not establish a prima facie case of group bias in the prosecution's peremptory challenges of all three African-Americans on the panel. (Superior Court of Contra Costa County, No. 96-0691-4, Patricia K. Sepulveda, Judge.)

The Court of Appeal reversed. The court held that the trial court erred in denying the motions. The record was bereft of any race-neutral explanation for the challenges, and it appeared the trial court denied the motions in the erroneous belief that the presumption that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. The court held that for purposes of determining whether a party has established a prima facie case of group bias under the California Constitution, the words "strong likelihood," as used in the leading California Supreme Court case and case law relating to its rule, must be deemed to mean a "reasonable inference" of bias in conformance with controlling federal law. The court also held that in a case in which the trial court finds that the defendant did not present a prima facie case and the prosecution thus provided no explanation, a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not one-sided, highly speculative, or unduly emphasized, but is solid and persuasive. (Opinion by Kline, P. J., with Lambden, J., concurring. Dissenting opinion by Haerle, J. (see p. 338).)

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II.

HEADNOTES

Classified to California Digest of Official Reports

(1) **Jury § 47.5—Challenges—Peremptory—Group Bias.**—The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution and by the California Constitution.

(2) **Jury § 47.6—Challenges—Peremptory—Group Bias—Prima Facie Case.**—To establish a prima face case of racial discrimination in the use of peremptory challenges to prospective jurors under the United States Constitution, a criminal defendant must raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. For purposes of determining whether a party has established a prima facie case of group bias under the California Constitution, the words "strong likelihood," as used in the leading California Supreme Court case and case law relating to its rule, must be deemed to mean a "reasonable inference" in conformance with controlling federal law.

(3) **Jury § 47.9—Challenges—Peremptory—Group Bias—Prima Facie Case—Review—Comparison of Jurors' Voir Dire Testimony.**—In determining whether a criminal defendant established a reasonable inference of group bias in the prosecution's exercise of peremptory challenges, appellate review is not limited to counsel's presentation at the time of the motion. Other circumstances apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel. Trial judges should consider all the circumstances of the case and exercise their powers of observation, their understanding of trial techniques, and their judicial experience. Thus, the reviewing court must consider the entire record of voir dire when a trial court denies a mistrial motion without finding a prima facie case of group bias. Because these motions call upon trial judges' personal observations, the appellate court views their rulings with considerable deference. In a case in which the trial court found that defendant did not present a prima facie case and the prosecution thus provided no explanation, a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not one-sided, highly speculative, or unduly emphasized, but is solid and persuasive. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, the court affirms. The ruling is thus reviewed for substantial evidence.

(4) **Jury § 47.8—Challenges—Peremptory—Group Bias—Improper Exclusion—Race—Prima Facie Case.**—In a murder prosecution, the trial court erred in finding that defendant, an African-American, did not establish a prima facie case of group bias in the prosecution's peremptory challenges of all three African American on the panel. The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a violation. In addition, two of the three African-American members of the venire were peremptorily challenged immediately after the trial court completed its routine questioning. The record was bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of two members or anything else in the record significantly differentiated them from members of the venire who served on the jury. It appeared the trial court denied the motion on the erroneous belief that the presumption that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, §§ 142, 149.]

COUNSEL

Stephen B. Bedrick for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Martin S. Kaye and Richard Rochman, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

KLINE, P. J.—Jay Shawn Johnson was convicted of second degree murder and assault resulting in the death of a child under the age of eight (Pen. Code, §§ 187, 273ab) upon retrial after a partial reversal on his first appeal. The murder victim was Janika Price, the 19-month-old daughter of Jennifer Shelton with whom appellant was romantically involved. In the first appeal, we affirmed appellant's conviction of corporal injury on a cohabitant, Jennifer Shelton (Pen. Code, § 273.5), and reversed his convictions of second

(4) Jury § 47.8—Challenges—Peremptory—Group Bias—Improper Exclusion—Race—Prima Facie Case.—In a murder prosecution, the trial court erred in finding that defendant, an African-American, did not establish a prima facie case of group bias in the prosecution's peremptory challenges of all three African American on the panel. The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a violation. In addition, two of the three African-American members of the venire were peremptorily challenged immediately after the trial court completed its routine questioning. The record was bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of two members or anything else in the record significantly differentiated them from members of the venire who served on the jury. It appeared the trial court denied the motion on the erroneous belief that the presumption that a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference.

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OPINION

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had omitted in her questionnaire the information about a parent's arrest for robbery some 30 years earlier. The court also recalled that Ms. E. had indicated concern about whether she could be fair, even though her "answers tend to lean in favor of the prosecution." The court made no comment about the challenge of Clodette T. In denying the motion the court stated: "Even with the addition of Ms. L., the Court will not find a prima facie case. The People are [not] exercising challenges based on group bias, rather than individual bias." The court then offered the prosecutor the opportunity to make a further record, which he declined.

(1) "The use of peremptory challenges to eliminate prospective jurors because of their race is prohibited by the federal Constitution (*Powers* v. *Ohio* (1991) 499 U.S. 400, 409 [113 L.Ed.2d 411, 424, 111 S.Ct. 1364]; *Batson* v. *Kentucky* (1986) 476 U.S. 79, 89 [90 L.Ed.2d 69, 82-83, 106 S.Ct. 1712]) and by the California Constitution (*People* v. *Wheeler*[, *supra*,] 22 Cal.3d 258, 276-277 . . .)." (*People v. Mayfield* (1997) 14 Cal.4th 668, 722-723 [60 Cal.Rptr.2d 1, 928 P.2d 485].)

A.

At the time the parties briefed this case, there was a dispute about whether *Wheeler* required a greater evidentiary showing for a prima facie case than was required under *Batson*.[2] *Wheeler* states: "If a party believes his opponent is using his peremptory challenges to strike jurors on the ground of group bias alone, he must raise the point in timely fashion and make a prima facie case of such discrimination to the satisfaction of the court. First, . . . he should make as complete a record of the circumstances as is feasible. Second, he must establish that the persons excluded are members of a

[2]Appellant cited only *Wheeler* in his motions for a mistrial and did not mention the federal Constitution or the *Batson* case. The People maintain that appellant's failure to articulate the federal basis for his objection to the peremptory challenges waives the claim, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1174 [9 Cal.Rptr.2d 834, 832 P.2d 146]. In *McPeters*, the court found the defendant had waived the asserted Sixth Amendment ground by failing to raise it in connection with his *Wheeler* motion, but it nevertheless rejected the claim on its merits. (*McPeters, supra*, 2 Cal.4th at p. 1174.) Appellant denies he waived his federal rights, citing *Ford v. Georgia* (1991) 498 U.S. 411, 418-419 [111 S.Ct. 850, 854-855, 112 L.Ed.2d 935], which held a defendant's objection to racial discrimination in jury selection was sufficient to invoke his federal right to be free of racial discrimination in jury selection under *Batson*, even if he did not cite *Batson* or describe with particularity the exact federal provision violated. (See also *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 811, fn. 1 [challenge framed in terms of *Wheeler* construed to allege *Batson*]; overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677.) The debate as to whether appellant made and preserved a *Batson* claim makes sense only if, as the parties seem to believe, it is more difficult to establish a prima facie case under *Wheeler* than under *Batson*. As later discussed, our Supreme Court has recently made it clear that *Wheeler* imposes the same standard as *Batson*. The question whether appellant waived a *Batson* claim is therefore now moot.

cognizable group within the meaning of the representative cross-section rule. Third, from all the circumstances of the case he must show a *strong likelihood* that such persons are being challenged because of their group association rather than because of any specific bias." (*People v. Wheeler, supra*, 22 Cal.3d at p. 280, italics added, fn. omitted.) In the next paragraph of the *Wheeler* opinion the court describes the types of evidence a party may use to show his opponent is challenging persons from the venire because of their group association. The opinion then goes on to state that "[u]pon presentation of this and similar evidence . . . the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone." (*Id.* at p. 281, italics added.) As will be seen, the separate references to "strong likelihood" and "reasonable inference" has created some confusion as to which of the two standards applies, as most courts that have addressed the question have concluded that a "strong likelihood" requires a stronger showing than a mere inference.

There is, however, no such confusion as to which standard applies under *Batson*, the federal counterpart to *Wheeler*. **(2)** To establish a prima face case of discrimination under the United States Constitution, *Batson*, states that a defendant must "*raise an inference* that the prosecutor used that practice [peremptory challenges] to exclude the veniremen from the petit jury on account of their race." (*Batson v. Kentucky, supra*, 476 U.S. at p. 96 [106 S.Ct. at p. 1723], italics added.) The difference in language between *Wheeler* ("strong likelihood") and *Batson* ("raise an inference") led to a dispute about whether *Wheeler* established a stricter test than *Batson*. In *People v. Fuller* (1982) 136 Cal.App.3d 403, 423 [186 Cal.Rptr. 283], which was decided prior to *Batson*, the court acknowledged that the *Wheeler* opinion uses both phrases, but concluded "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias . . . ." (*Ibid.*) The *Fuller* court was "unwilling to believe that our high court intended to create different options for trial judges within one page of each other in so carefully crafted an opinion as the *Wheeler* opinion." (*Id.* at p. 423, fn. 25.)

The *Fuller* view of *Wheeler* was repudiated in *People v. Bernard* (1994) 27 Cal.App.4th 458 [32 Cal.Rptr.2d 486] which rejected the view "that a fair reading of *Wheeler* requires only that the court find a reasonable inference of group bias." (*People v. Fuller, supra*, 136 Cal.App.3d at p. 423.) According to the *Bernard* court, "a reduction of the prima facie standard to a 'reasonable inference' test would reduce the trial court's discretion and judgment at a time when it is uniquely situated to observe the nature and extent of voir dire as well as the attitude and awareness of the challenged prospective juror." (27 Cal.App.4th at p. 465) The conclusion of the *Bernard* court that

a "strong likelihood" requires a stronger showing than a "reasonable inference," and that such a stronger showing must be made to establish a prima facie case of violation of the *Wheeler* rule, has been followed by other appellate courts in this state. (See, e.g., *People v. Buckley* (1997) 53 Cal.App.4th 658, 665-666 [61 Cal.Rptr.2d 860]; *People v. Walker* (1998) 64 Cal.App.4th 1062, 1067 [75 Cal.Rptr.2d 871].)

Recently, in *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, the Ninth Circuit observed that since the decision in *Bernard*, "the California state courts have applied a lower standard of scrutiny to peremptory strikes than the federal Constitution permits. [¶] The California Supreme Court now routinely insists, despite *Batson*, that a defendant must show 'a strong likelihood' of racial bias. Its consistent practice is to cite *Batson* and *Wheeler* together as controlling law but to quote the 'strong likelihood' language from *Wheeler* rather than the 'raise an inference' language from *Batson*. [Citations.] *Batson* is, of course, the law of the land. California law may give greater protection to criminal defendants than is required by the federal Constitution, but it cannot give less. Yet this is precisely what the California courts now do when they follow the *Wheeler* 'strong likelihood' test in determining whether a prima facie case has been established. [¶] In our view, the *Wheeler* 'strong likelihood' test for a successful prima facie showing of bias is impermissibly stringent in comparison to the more generous *Batson* 'inference' test." (*Id.* at pp. 1196-1197, italics omitted.) Accordingly, the *Wade v. Terhune* court concluded that "[w]here the California courts follow the 'strong likelihood' language of *Wheeler* without any indication that they are actually applying a 'reasonable inference' test consonant with *Batson*, they apply an incorrect legal standard." (*Id.* at p. 1197.)

Wade v. Terhune also opines "that the *Wheeler* Court itself understood 'a strong likelihood' to mean a 'reasonable inference.' While the *Wheeler* Court, on page 280 of its opinion, required a defendant to 'show a strong likelihood' that the prosecutor excluded venire members from the jury on the basis of race, the *Wheeler* Court phrased its central holding somewhat differently on the very next page: 'Upon presentation of this and similar evidence—in the absence, of course, of the jury—the court must determine whether a *reasonable inference* arises that peremptory challenges are being used on the ground of group bias alone.' *Id.* at 281 . . . (emphasis added). It is this language regarding a 'reasonable inference' that the Supreme Court of the United States borrowed when it formulated the *Batson* test." (*Wade v. Terhune, supra*, 202 F.3d at p. 1196.)

In *People v. Box* (2000) 23 Cal.4th 1153 [99 Cal.Rptr.2d 69, 5 P.3d 130], which issued six months after *Wade v. Terhune*, our high court included a

short footnote agreeing with the Ninth Circuit that "in California, a 'strong likelihood' means a 'reasonable inference' " (*id.* at p. 1188, fn. 7) and disapproving *People v. Bernard, supra,* 27 Cal.App.4th 458.[3] The Attorney General dismisses this statement as relatively insignificant. All it means, he says, is that the Supreme Court and intermediate appellate courts were always adhering to the *Batson* standard. In other words, according to the Attorney General, for *Wheeler* purposes, "strong likelihood" and "reasonable inference" have always meant the same thing; because the test is the same it is immaterial which phrase is used. As we shall discuss in a moment, this view, which we attribute neither to the Ninth Circuit nor our Supreme Court, conflicts with common understanding and the different meanings historically attributed by our legal system to the words at issue, would cause enormous confusion in the trial courts of this state and exacerbate the doubts that have already been raised as to the compatibility of *Wheeler* and *Batson*. Moreover, the notion that our Supreme Court not only thinks but has *always thought* that a "strong likelihood" is synonymous with a "reasonable inference" for purposes of the *Wheeler* rule, and that the lower courts of this state knew or should have known of this, was persuasively rebutted by the Ninth Circuit in *Wade v. Terhune, supra,* 202 F.3d at pages 1196-1197.

Though not cited in *Wade v. Terhune, supra,* 202 F.3d 1190, *People v. Sanders* (1990) 51 Cal.3d 471 [273 Cal.Rptr. 537, 797 P.2d 561] demonstrates the California Supreme Court's post-*Wheeler* and pre-*Box* belief that the "strong likelihood" requirement imposes a more stringent burden that the "reasonable inference" requirement. In *Sanders,* all but four Spanish surnamed members of the venire were excused for cause either by the defense or the prosecution. When the remaining four were peremptorily challenged by the prosecution, the defendant asserted a *Wheeler* objection. The trial court denied the motion, finding the defendant had failed to demonstrate a prima facie case that the prosecutor was relying on group rather than specific bias. The Supreme Court affirmed. Acknowledging that "the removal of all members of a certain group may give rise to an inference of impropriety" under *Wheeler* (*People v. Sanders, supra,* at p. 500), the Supreme Court emphasized the deference owed the trial court and primarily on that basis concluded that the "defendant failed to demonstrate a strong likelihood based on 'all the circumstances of the case' that the prosecutor's exercise of his peremptory challenges were based on group bias." (*Id.* at p. 501) After

[3]Prior to *Box*, our Supreme Court made no effort to clarify the ambiguity in *Wheeler*. Nor has it yet done so since *Box*. In *People v. Ayala* (2000) 24 Cal.4th 243 [99 Cal.Rptr.2d 532, 6 P.3d 193], Justice Mosk, writing for the majority, simply states in passing that a party claiming peremptory challenges are being used to strike jurors on the ground of group bias must, among other things, " ' " 'show a strong likelihood [or reasonable inference] that such persons are being challenged because of their group association . . . .' " ' " (*Id.* at p. 260, quoting *People v. Box, supra,* 23 Cal.4th at pp. 1187-1188; brackets added in *Box*.)

Sanders, most Supreme Court opinions applying the *Wheeler* rule omit any reference to the "reasonable inference" standard and focus *only* on the need to show a "strong likelihood" of group bias. (See, e.g., *People v. Welch* (1999) 20 Cal.4th 701, 745 [85 Cal.Rptr.2d 203, 976 P.2d 754]; *People v. Williams* (1997) 16 Cal.4th 635, 663-664 [66 Cal.Rptr.2d 573, 941 P.2d 752]; *People v. Mayfield, supra,* 14 Cal.4th 668, 723; *People v. Arias* (1996) 13 Cal.4th 92, 134-135 [51 Cal.Rptr.2d 770, 913 P.2d 980]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1199-1200 [47 Cal.Rptr.2d 800, 906 P.2d 1068]; *People v. Turner* (1994) 8 Cal.4th 137, 164-165 [32 Cal.Rptr.2d 762, 878 P.2d 521]; *People v. Garceau* (1993) 6 Cal.4th 140, 170-171 [24 Cal.Rptr.2d 664, 862 P.2d 664].) Indeed, the court has even italicized "strong likelihood" to emphasize the stringency of that requirement. (*People v. Howard* (1992) 1 Cal.4th 1132, 1154 [5 Cal.Rptr.2d 268, 824 P.2d 1315].)

In light of this, as the Ninth Circuit correctly observed, California courts confidently relied on the now disapproved language in *People v. Bernard, supra,* 27 Cal.App.4th at pages 464-466, supporting application of the more demanding "strong likelihood" standard. In the present case, for example, in finding that appellant did not establish a prima facie case of group bias, the trial court stated as follows: "there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds." This language tracks the disapproved language in *Bernard* that the "presumption a party exercising a peremptory challenge is doing so on a constitutionally firm ground. . . . should be capable of being rebutted only by *a strong showing*, not a *mere inference*." (*Id.* at p. 465, italics added.) As this formulation of the initial showing of discrimination required by *Wheeler* has been rejected, we do not believe we can employ it.

The question, then, is the meaning of the footnoted statement in *Box* that "in California, a 'strong likelihood' means a 'reasonable inference.' " (23 Cal.4th at p. 1188, fn. 7.) We do not believe it means that California courts have always treated the two phrases as meaning the same thing, which would be as novel a proposition as the idea that "clear and convincing evidence" has always meant a "preponderance of the evidence."

Though an "inference" may be defined as "an implication" (7 Oxford English Dict. (2d ed. 1989) p. 924), the word is ordinarily used in the law to refer to "[a] conclusion reached by considering other facts and deducing a logical consequence from them," or "[t]he process by which such a conclusion is reached; [i.e.,] the process of thought by which one moves from evidence to proof." (Black's Law Dict. (7th ed. 1999) p. 781.) An inference

may be reasonably deducible from evidence even if it conflicts with another inference that may also be deducible from the same evidence. (See, e.g., *Grainger v. Antoyan* (1957) 48 Cal.2d 805, 807 [313 P.2d 848] ["When two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court."]; Code Civ. Proc., § 437c, subd. (c) ["summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence, if contradicted by other inferences or evidence"].) As Witkin points out, "the party's proof need not wholly exclude all unfavorable inferences; i.e., the party is not required to show that, under the circumstances, the inference in his or her favor is the only one that can reasonably be drawn. [Citations.]" (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 139, p. 198.)

However, while the same evidence, including circumstantial evidence, can give rise to conflicting inferences that are equally reasonable, the same evidence cannot simultaneously support "strong likelihoods" pointing in different directions. Thus, while courts in this state have disagreed about whether the initial showing of discrimination that constitutes a prima facie case under *Wheeler* is a "strong likelihood" or a "reasonable inference" (as, e.g., the disagreement of *People v. Bernard, supra*, 27 Cal.App.4th at pp. 465-466, with the view expressed in *People v. Fuller, supra*, 136 Cal.App.3d at p. 423), the dispute was predicated upon the shared belief that the latter standard imposes a lesser burden than the former. Indeed, as already noted, the belief that a "strong likelihood" of group bias requires greater evidence than a "reasonable inference" of such bias was expressed by the Supreme Court more than a decade ago. (*People v. Sanders, supra*, 51 Cal.3d at pp. 500-501.)

The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference' " (*People v. Box, supra*, 23 Cal.4th at p. 1187, fn. 7) cannot be construed to mean that the phrases are synonymous (let alone that they were *always* thought to be synonymous), as that would reject long-standing judicial understandings, and require explanation. The different meaning of the statement is revealed, we think, by its obvious purpose, which was to reconcile *Wheeler* and *Batson* after its incompatible application of *Wheeler* was called to our Supreme Court's attention by the Ninth Circuit in *Wade v. Terhune*. As the Ninth Circuit stated, "[t]he United States Supreme Court has explained that the *Batson* framework was intended significantly to reduce the quantum of proof previously required of a defendant who wished to raise a claim of racial bias in the jury selection procedure. See *Georgia v. McCollum*, 505 U.S. 42, 47 [112 S.Ct. 2348, 2352-2353, 120 L.Ed.2d 33]." (*Wade v. Terhune, supra*, 202 F.3d at p. 1197.) *Wheeler* is not consistent with the

Batson framework unless the quantum of proof required by *Wheeler* to establish a prima facie case of group bias is no higher than that required under *Batson*. The statement in *Box* that "a 'strong likelihood' means a 'reasonable inference' " (*Box*, at p. 1187, fn. 7) therefore must be taken to mean that, *for purposes of determining whether a party has established a prima facie case of group bias*, the words "strong likelihood," *as used in Wheeler and case law relating to the Wheeler rule*, shall henceforth be deemed to mean a "reasonable inference" (which is the opposite of saying that a "reasonable inference" shall be deemed to mean a "strong likelihood"). This was the view of *Wheeler* adopted in *People v. Fuller, supra*, 136 Cal.App.3d 403, and rejected in *People v. Bernard, supra*, 27 Cal.App.4th 458. By disapproving *Bernard*, the Supreme Court has in effect clarified its agreement with *Fuller* that a "reasonable inference" of group bias suffices to establish a prima facie case.

We note, finally, that the Ninth Circuit has indicated its unwillingness to defer to the Attorney General's different interpretation of *People v. Box, supra*, 23 Cal.4th 1153, as clarifying that the "strong likelihood" and "reasonable inference" standards are now and have always been the same , and that use of the "strong likelihood" standard is therefore constitutionally permissible. In *Cooperwood v. Cambra* (9th Cir. Feb. 20, 2001, No. 99-15518) __ F.3d __ [2001 WL 322149], the Ninth Circuit recently declared that "regardless of the California Supreme Court's 'clarification' [in *Box*] of the language used in *Wheeler*, we will continue to apply *Wade*'s de novo review requirement whenever state courts use the 'strong likelihood' standard, as these courts are applying a lower standard of scrutiny to peremptory strikes than the federal Constitution permits." (*Ibid.*, citing *Wade v. Terhune, supra*, 202 F.3d at p. 1192.)

B.

(3) In determining whether appellant established a reasonable inference of group bias, we do not limit our review solely to counsel's presentation at the time of the motion. This is because "other circumstances" readily apparent to the trial court might support the finding of a prima facie case even though not cited by defense counsel. (See *People v. Howard, supra*, 1 Cal.4th at p. 1155.) "[T]he trial court [should not] blind itself to everything except defense counsel's presentation." (*Ibid.*) Indeed, *Wheeler* emphasized that such rulings require trial judges to consider "all the circumstances of the case" (*People v. Wheeler, supra*, 22 Cal.3d at p. 280) and called upon judges to exercise their powers of observation, their understanding of trial techniques and their broad judicial experience. (*Howard, supra*, 1 Cal.4th at p. 1155.)

It is for these reasons that the reviewing court is directed to consider "the entire record of voir dire" when a trial court denies a *Wheeler* motion without finding a prima facie case of group bias. "As with other findings of fact, we examine the record for evidence to support the trial court's ruling." (*People v. Howard, supra*, 1 Cal.4th at p. 1155.) Because *Wheeler* motions call upon trial judges' personal observations, we view their rulings with considerable deference on appeal. If the record suggests grounds upon which the prosecutor might reasonably have challenged the jurors in question, we affirm. (*Ibid.*; *People v. Box, supra*, 23 Cal.4th at p. 1188.) The ruling is thus reviewed for substantial evidence. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 196 [58 Cal.Rptr.2d 385, 926 P.2d 365].)

As will be seen, the prima facie case asserted in this case rests in some measure on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparison may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by California courts has differed somewhat from federal judicial application of *Batson*.

Relying on its earlier opinion in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221 [255 Cal.Rptr. 569, 767 P.2d 1047], which dealt with the review of reasons proffered by the prosecutor after a prima facie case had been found, the California Supreme Court has recently reiterated its rejection of "a procedure that places an "undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor," noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial.' " (*People v. Box, supra*, 23 Cal.4th at p. 1190.)

Federal courts have not been as reluctant as our Supreme Court to employ comparative analyses of voir dire testimony in order to determine whether the use of a peremptory challenge reflects racial or other forms of group bias and routinely do so. (See, e.g., *Caldwell v. Maloney* (1st Cir 1998) 159 F.3d 639, 651, cert. den. 522 U.S. 1153 [118 S.Ct. 1178, 140 L.Ed.2d 186] [reasons given for challenge, though plausible, may raise serious question of pretext where explanation is equally applicable to juror of different race who was not stricken]; *Devose v. Norris* (8th Cir 1995) 53 F.3d 201, 203-205 [finding state's reason for excusing Black jurors pretextual when several White jurors who were not struck gave similar answers].) This is particularly

true in the Ninth Circuit. As a panel of that court recently observed, "[a] prosecutor's motives may be revealed as pretextual where a given exception is equally applicable to a juror of a different race who was not stricken by the exercise of a peremptory challenge. See *Caldwell v. Maloney*, 159 F.3d 639, 651[, *supra*]. 'A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that facially race-neutral reasons are a pretext for discrimination.' *Turner v. Marshall*, 121 F.3d 1248, 1251 (9th Cir. 1997). Peremptory challenges cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged. See *id.*" (*McClain v. Prunty* (9th Cir 2000) 217 F.3d 1209, 1220-1221; accord, *U.S. v. Chinchilla* (9th Cir. 1989) 874 F.2d 695.)

The difference between our Supreme Court and the Ninth Circuit is not, however, as great as it first appears. For one thing, our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an "*undue emphasis*" on such an analysis (*People v. Box, supra*, 23 Cal.4th at p. 1190; *People v. Turner, supra*, 8 Cal.4th at p. 169; *People v. Johnson, supra*, 47 Cal.3d at p. 1220.) Indeed, the Supreme Court has itself occasionally engaged in such analyses. For example, in *People v. Crittenden* (1994) 9 Cal.4th 83 [36 Cal.Rptr.2d 474, 885 P.2d 887], in considering a challenge to a trial court finding that no prima facie case had been shown, the court entertained the defendant's claim that many jurors had expressed similar concerns about the death penalty as prospective African-American jurors who were excused. Instead of refusing to consider such a comparison, the *Crittenden* court rejected the appellant's argument on its own terms, "because all except one of these prospective jurors were excused (almost all by the prosecutor), and the prosecutor's failure to excuse the remaining juror must be viewed in light of the circumstance that the juror was called later in the proceedings, when the prosecutor's remaining peremptory challenges were few." (*Id.* at p. 119.) Also, in *People v. Jones* (1998) 17 Cal.4th 279, 295 [70 Cal.Rptr.2d 793, 949 P.2d 890], the court addressed the defendant's comparative analysis claim that other prospective jurors who were not Black had expressed doubts about the death penalty but were impaneled anyway. It rejected the claim on its merits, finding sufficient evidence in the record to support the trial court's refusal to find a prima facie case.

It is also important to emphasize that the cases in which the Supreme Court cautioned against the placing of undue emphasis on the appellate use of comparison analysis (*People v. Box, supra*, 23 Cal.4th 1153; *People v. Turner, supra*, 8 Cal.4th 137; *People v. Montiel* (1993) 5 Cal.4th 877 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Johnson, supra*, 47 Cal.3d 1194)

were ones in which the trial court called for, received and accepted a race-neutral explanation from the attorney whose challenges were questioned. The important question in those cases was not whether a prima facie case of group bias had been established, but whether counsel's explanation was credible. The Supreme Court admonished against the excessive appellate use of comparison analysis in those cases because it related to the ultimate determination of bias and could not be squared with the deference that had to be accorded a trial court determination of the credibility of a proffered explanation. For example, in *People v. Montiel*, the prosecutor analyzed the views of challenged and unchallenged members of the venire and the trial judge made a "sincere and reasoned effort" to evaluate the nondiscriminatory justifications he offered. "In such circumstances," the Supreme Court stated, "an appellate court will not *reassess* good faith by conducting its own comparative juror analysis." (5 Cal.4th at p. 909, italics added.) A very different situation is presented, however, where, as in the matter before us, the trial judge neither received from counsel nor itself provided any racially neutral explanation but nonetheless refused to find a prima facie case of group bias. The issue here is neither the credibility of a racially neutral explanation nor the ultimate question of bias, but merely the *appearance* of such bias as would *call* for an explanation. Where reasons for a questioned challenge are not required by the trial court or offered by counsel, a reviewing court will often be unable to reasonably determine whether the *Wheeler* rule has been violated without some examination and comparison of the voir dire testimony of excluded and nonexcluded jurors. Barring *any* appellate use of such comparisons in those cases would materially compromise the ability of reviewing courts to intelligently evaluate the denial of *Wheeler/Batson* claims. In light of the importance of appellate review to a correct criminal adjudication (*Griffin v. Illinois* (1956) 351 U.S. 12, 18 [76 S.Ct. 585, 590, 100 L.Ed. 891, 55 A.L.R.2d 1055]), inadequate state appellate review might undermine the presumption of the correctness of state court rulings indulged by federal courts in habeas corpus proceedings (28 U.S.C. § 2254(d)), and leave to the federal courts the enforcement of an important right arising not just under the United States Constitution but independently under our own Constitution. (See *Burks v. Borg* (9th Cir. 1994) 27 F.3d 1424, 1428.)

We do not think our Supreme Court contemplates any abdication of state judicial responsibilities. *Wheeler* implicitly acknowledges that the exclusion of jurors on the basis of race "condones violations of the United States Constitution [and our own Constitution] within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law." (*Powers v. Ohio* (1991) 499 U.S. 400, 412 [111 S.Ct. 1364, 1371, 113 L.Ed.2d 411].) In the light of this

danger, judges must be vigilant and assertive. As stated in *Wheeler*, "the courts cannot be pacifists" in the "war" between racial discrimination in jury selection and our basic concepts of a democratic society. (*People v. Wheeler, supra*, 22 Cal.3d at p. 280.) The *Wheeler* rule is meaningless unless a trial court finding that a prima facie case of racial or group bias has not been established is subject to meaningful review. Where such a finding is unexplained by the trial court or by counsel, a reviewing court must be able to examine all the relevant evidence, including a comparison of the voir dire testimony of excluded and nonexcluded jurors.

It is also necessary to remember that *People v. Howard, supra*, 1 Cal.4th 1132, 1155 states that judicial review of a defendant's attempt to establish a prima facie case is not limited to a review solely of counsel's presentation at the time of the motion in order to ensure that even if the defendant's showing is inadequate, there are no "other circumstances" which might support a finding of a prima facie case. Courts of Appeal have lamented that by relieving trial courts of the need to provide a rationale for a no prima facie case finding, and requiring appellate courts to examine the entire record in search of a justification, the Supreme Court has in effect compelled reviewing courts "to move into the realm of speculation concerning why a party 'may' have a reason to challenge a juror other than his or her membership in a cognizable group." (*People v. Trevino* (1997) 55 Cal.App.4th 396, 409 [64 Cal.Rptr.2d 61].) As one court has stated, "where a defendant fails to make a prima facie case and, because of that, the prosecutor has not been called upon to state race-neutral reasons for exercising a peremptory, the appellate court, under the position taken by the California Supreme Court in *Howard*, is placed in the almost untenable position of culling from the record possible race-neutral reasons for excusal." (*People v. Walker, supra*, 64 Cal.App.4th 1062, 1069; accord, *People v. Buckley, supra*, 53 Cal.App.4th 658, 667 ["It is clearly uncomfortable for an appellate court to postulate hypothetical reasons a prosecutor might have challenged each juror."].) Needless to say, the problem created by *Howard* would be immeasurably exacerbated, and it would be irrational and unfair, if a comparison of the voir dire testimony of challenged and unchallenged members of the venire were excluded from the "other circumstances" reviewing courts have been required by the Supreme Court to examine.

For the foregoing reasons, we conclude that in a case such as this a reviewing court may examine and compare the voir dire testimony of those members of the venire excluded from the jury and those who were not, provided such evidence is not "one-sided," "highly speculative" or "unduly emphasized" (*People v. Johnson, supra*, 47 Cal.3d at pp. 1220-1221), but solid and persuasive.

(4) With these thoughts in mind, we proceed to consider the voir dire testimony and other evidence appellant relies upon in arguing that the trial court erred in finding he did not establish a prima facie case of group bias. We preface our analysis, however, by noting that the prosecution's use of peremptory challenges removed all African-Americans from the jury, and in *People v. Sanders, supra*, 51 Cal.3d at page 500, the Supreme Court indicated that this *alone* "may give rise to an inference of impropriety." (Accord, *U.S. v. Chinchilla, supra*, 874 F.2d 695, 698, fn. 4; *U.S. v. Thompson* (9th Cir. 1987) 827 F.2d 1254, 1256-1257; *U.S. v. Alcantar* (9th Cir. 1987) 832 F.2d 1175, 1177.)

Clodette T.

Clodette T.'s juror questionnaire revealed she was 42 years old, had been divorced for 11 years, had no children, and had lived in Richmond for 10 years. She had been employed in an administrative job at IBM for nine years, had attended some regular college and was a graduate of business college. She had served on a civil jury in a medical malpractice case, and that jury had reached a verdict. This was a positive experience for her. Question 20 asked, "Do you have a favorable, neutral, or unfavorable opinion of your African-American or black co-workers?" She responded: "Being an African-American myself, I am favorable." None of her other answers contained information that would give pause to either side.

During oral questioning, Ms. T. stated that her house had been "robbed" five or six years ago and that no arrest had been made for it. In examining Ms. T.'s questionnaire, the trial court noted that she had omitted answers to questions 57 and 58 (out of a total of 64 questions, spanning 17 pages) asking for her opinions about prosecuting attorneys and criminal defense attorneys. Ms. T. said she made a mistake in omitting answers to those questions, but did so only because she had no opinions on those topics. In the six or so other questions asked, Ms. T. gave no answer that would provide a race-neutral reason for finding her unsuitable as a juror. Indeed, the court asked only 10 questions in all, and the prosecutor declined the court's invitation to ask follow-up questions.

No basis other than race appears for the prosecutor's peremptory challenge of Ms. T. Her name was never mentioned by counsel or the court during argument on either of the *Wheeler* motions. The fact that she left questions 57 and 58 blank cannot be credited as a valid justification in light of the fact that the same thing was done by White Juror No. 7 (questionnaire No. 50) who also explained he had no opinions on the subject of those questions, and by White Juror No. 10 (questionnaire No. 89).

Ms. T.'s answer to question 20 that she had a favorable opinion of African-American coworkers cannot be credited as a valid reason for the peremptory challenge. The only factor that distinguishes her from the many other jurors who gave the same answer is that she is African-American. White Juror No. 3 (questionnaire No. 47), Hispanic/Latino juror No. 6 (questionnaire No. 78), and White Juror No. 8 (questionnaire No. 10) all answered that they had favorable opinions of their African-American coworkers, and none were challenged by the prosecutor.

Sara E.

Sara E.'s questionnaire revealed that she was 36 years old, had never been married, and had lived in West Contra Costa County for 19 years. She had worked for Pacific Bell for 13 years, performing wiring for telephone service. Her car had been broken into five years before. She had served on a criminal jury in a robbery case in the early 1980's and that jury had reached a verdict. Question 63 asked a prospective juror whether filling out the questionnaire changed his or her attitude in any way about sitting as a juror in this case. She wrote: "I had no feelings one way or the other about sitting as a juror until I found out who the victim was. I am deeply saddened that it was an eighteen month old child. Based on the evidence brought forward, I will not allow my emotions to get in the way of the verdict." (Underscoring in original.)

During questioning on voir dire, the court mentioned that Ms. E. had failed to answer question 30, which asked whether she or a family member had ever been arrested. Ms. E. responded that one of her parents had been arrested for robbery in another location over 35 years ago. As previously mentioned, Ms. E. was 36 years old. She knew nothing about how the police or district attorney had treated her parent.

Written question 40 inquired whether the fact that this case involved an allegation of murder and child abuse of an 18-month-old child would affect the juror's ability to be fair and impartial. Ms. E. wrote "don't know." The court asked how she felt about that now, and she replied that she could be fair and impartial.

Declining the court's explicit invitation to ask follow-up questions, the prosecutor immediately challenged Ms. E. At that point, defense counsel made his first *Wheeler* motion.

With regard to Sara E., the trial court cited the following factors in refusing to find a prima facie case: (1) she failed to answer question 30 on

the written questionnaire regarding an arrest in the juror's family; (2) her parent had been arrested for robbery over 35 years ago; and (3) she wrote on the questionnaire that because of the child abuse facts, she didn't know if she could be fair and that she had emotions and feelings which may have caused concern.[4] The court stated: "Even through the answers tend to lean in the favor of the prosecution in the case, neither side would want a juror deciding a case based upon emotions, rather than the facts and the evidence."

Appellant contends that this explanation for the court's refusal to find a prima facie case of group bias ignores and is inconsistent with several highly relevant circumstances. He argues, first, that omitting an answer on a 17-page, 63-item questionnaire could not possibly be deemed a legally valid, race-neutral reason for challenging Ms. E. in light of the fact that White members of the venire who failed to answer questions served on the jury without objection from the district attorney.

The arrest of Ms. E.'s parent over 35 years ago, when Ms. E. was an infant, cannot fairly be considered a race-neutral reason for her challenge, appellant argues, because the prosecutor failed to challenge several Whites who served on the jury who themselves or whose families were much more recently the subject of criminal charges. Juror No. 9's brother was arrested for battery on a police officer just three years earlier. The brother of alternate Juror No. 1 was arrested for statutory rape seven years earlier. Finally, three other seated jurors had themselves been arrested for driving under the influence of alcohol or a related charge.

Appellant argues that the trial court mischaracterized Ms. E.'s written response "don't know" to question 40, which inquired whether there was anything about the nature of the charges that caused her to question her ability to be fair and impartial. The court characterized this answer as saying Ms. E. didn't know if she could be fair. But this discounts Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial. Further, as might be expected, Ms. E. was hardly the only member of the venire to initially express an emotional reaction to child abuse charges. Answers to the questionnaire given by numerous other jurors, both female and male, also indicated abhorrence of child abuse but, like Ms. E., later orally affirmed

[4]In defense of the trial court's ruling, the dissent mentions as an additional justification the fact that Sara E. answered "yes" to question 28: "Do you have any legal training or have you taken any law courses?" The same answer was given by Juror No. 11, who was not challenged. The trial court attached so little significance to Sara E.'s answer that it did not query her on it during voir dire, whereas Juror No. 11 was questioned at length about her legal training and experience (prelaw as an undergraduate; worked at law firm in high school and college).

that they could nonetheless be fair and impartial, and were not challenged by the prosecution.

Considering the record in its entirety, and giving particular weight to the considerations our Supreme Court identified as relevant in *Wheeler*,[5] we determine that appellant established a prima facie case that the prosecution's use of peremptory challenges to excuse Clodette T. and Sara E. reflect group bias.[6] The prosecutor struck all African-Americans on the venire; used a disproportionate number of his peremptory challenges against members of that racial group (3 out of 3 or 100 percent of the African-Americans, versus 9 out of 40 or 22 percent of the other prospective jurors);[7] completely excluded African-Americans from the jury; failed to engage in any questioning whatsoever of any prospective African-American juror despite invitations to do so from the court, and despite a warning to the district attorney that his conduct seemed "very close" to a *Wheeler* violation. In addition, two of the three African-American members of the venire (Sara E. and Ruby L.) were peremptorily challenged immediately after the trial court completed its routine questioning. Finally, as earlier discussed, the record is bereft of any race-neutral explanation for these challenges. Nothing in the oral or written responses on voir dire of Clodette T. and Sara E., or anything else in the record, significantly differentiates them from members of the venire who served on the jury. Nor is there anything in their testimony suggesting they would be hostile to the prosecution; indeed, as the court observed, Sara E.'s answers "tend to lean in favor of the prosecution." We are, in short, unable to find any basis in the record for the trial judge's stated conclusion that "[t]he People are not exercising challenges based on group bias, rather than individual bias."

It appears to us that the court's determination that appellant failed to establish a prima facie case of group bias was based not on the existence of

[5]With respect to the type of evidence that may be used to establish a prima facie case of group bias, the *Wheeler* court stated that the moving party "may show [1] that his opponent has struck most or all of the members of the identified group from the venire, or [2] has used a disproportionate number of his peremptories against the group. [3] He may also demonstrate that the jurors in question share only this one characteristic—their membership in the group—and that in all other respects they are as heterogeneous as the community as a whole. [4] Next, the showing may be supplemented when appropriate by such circumstances as the failure of his opponent to engage these same jurors in more than desultory voir dire, or to ask them any questions at all." (*People v. Wheeler, supra*, 22 Cal.3d at pp. 280-281, fn. omitted.)

[6]A new trial is required if there was a prima facie case of a *Wheeler* violation as to *even one* of a cognizable group of prospective jurors. (*People v. Montiel, supra*, 5 Cal.4th 877, 909; *People v. Fuentes* (1991) 54 Cal.3d 707, 716, fn. 4 [286 Cal.Rptr. 792, 818 P.2d 75].) Accordingly, our finding of a prima facie case as to Ms. T. and Ms. E. makes it unnecessary to review the validity of the peremptory challenge to Ruby L., the third and last potential African-American juror, who the trial court seemed to believe might be unable to fully understand the proceedings.

[7]The prosecutor exercised a total of 12 peremptory challenges, defense counsel exercised 16 such challenges.

a persuasive race neutral explanation—because neither the district attorney nor the court produced such a reason—but on the belief that the presumption a party exercising a peremptory challenge is doing so on a constitutionally permissible ground can be rebutted only on a stronger showing of group bias than a reasonable inference. But, as we have explained, that theory, which is at the heart of the opinion in *People v. Bernard, supra*, 27 Cal.App.4th at page 465, has been repudiated by the Supreme Court. For purposes of establishing a prima facie case of a *Wheeler* violation, an inference is "reasonable," or a likelihood "strong" if the record provides no *apparent* race-neutral reason for exercising a peremptory challenge. That is the case here.

The trial court's refusal to find a prima facie case ended the inquiry before the prosecutor would have been required to provide justification for his challenges. If the prosecutor had a reasonable race neutral explanation for peremptorily challenging these two members of the venire, it simply does not appear in the record. When, as here, no prima facie case is found and thus no explanation given, the reviewing court is left to speculate about possible explanations which, in this case, are not readily apparent. It may reasonably be inferred from the record that the district attorney excluded Clodette T. and Sara E. because of their race, as that is the only discernible difference between these members of the venire and those who served on the jury. As earlier noted, in reviewing California trial court compliance with *Wheeler*, which it treats as the functional equivalent of *Batson* (*McClain v. Prunty, supra*, 217 F.3d 1209, 1216, fn. 2; *Tolbert v. Page, supra*, 182 F.3d 677, 679 (en banc)), the Ninth Circuit has repeatedly declared that peremptory challenges "cannot be lawfully exercised against potential jurors of one race unless potential jurors of another race with comparable characteristics are also challenged." (*McClain v. Prunty, supra*, 217 F.3d at p. 1221; *Turner v. Marshall, supra*, 121 F.3d 1248, 1251.) That test has not been met in this case. By unjustifiably relieving the district attorney of the responsibility to provide a race-neutral explanation for these exclusions, the trial court abused its discretion and a new trial is therefore required. (*People v. Montie', supra*, 5 Cal.4th at p. 909; *People v. Fuentes, supra*, 54 Cal.3d at p. 716, fn. 4.)

This might easily have been avoided. "The procedure designed in *Wheeler* to prevent racial discrimination in jury selection, and preserve public confidence in our courts, is not onerous. Ordinarily it takes but a few moments for a party who uses a peremptory challenge to explain why an objecting adversary has failed to establish a prima facie case or, if the court finds a prima facie case has been established, to provide a racially neutral explanation for the challenge if this can be done. Trial courts should not lightly relieve counsel of these important responsibilities, either by too readily accepting vague explanations (see Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges* (1990) 76 Cornell L.Rev. 1 at pp. 97-98; Bell, Race, Racism and American Law (3d ed. 1992) § 5.16.4, p. 383) or, as appears to have occurred here by elevating the 'strong likelihood' standard to a level that can rarely be met by trial counsel, who are ordinarily in the difficult position of having to prove a negative, and must do so without the opportunity for preparation in advance under the considerable pressures imposed by trial proceedings." (*People v. Buckley, supra*, 53 Cal.App.4th at pp. 681-682 (dis. opn. of Kline, P. J.), fn. omitted.)

II.*

. . . . . .

III.

DISPOSITION

The judgment is reversed.

Lambden, J., concurred.

HAERLE, J.—For at least four different reasons, I respectfully but strongly dissent.

1. First of all, the majority apparently believes that footnote 7 in our Supreme Court's opinion in *People v. Box* (2000) 23 Cal.4th 1153, 1188 [99 Cal.Rptr.2d 69, 5 P.3d 130] (*Box*), signals a major shift from its previous position regarding the applicable test under *People v. Wheeler* (1978) 22 Cal.3d 258 [148 Cal.Rptr. 890, 583 P.2d 748] (*Wheeler*) and *Batson v. Kentucky* (1986) 476 U.S. 79 [106 S.Ct. 1712, 90 L.Ed.2d 69] (*Batson*). I disagree; clearly, all our Supreme Court was saying by that footnote was: "these two terms mean the same thing to us and always have, so what's all the fuss about?"

That fuss was, as the majority suggests, the result of an opinion of a panel of the Court of Appeals for the Ninth Circuit, *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190 (*Wade*). While affirming a lower court's denial of a

*See footnote, *ante*, page 318.

petition for a writ of habeas corpus, *Wade* spent considerable space gratuitously suggesting that past California Supreme Court opinions had differentiated between the two standards and had, erroneously, applied only the " 'strong likelihood' " standard.[8] (*Wade, supra,* 202 F.3d at pp. 1195-1198.)

The *Wade* opinion appeared in print in February 2000, after *Box*, a capital case, had been fully briefed.[9] Obviously, our Supreme Court wanted to promptly reassure the lower courts of this state that, the Ninth Circuit panel to the contrary, it knew what it was doing regarding the *Wheeler/Batson* standard, and it opted to do so in both a prompt and succinct way via footnote 7 of *Box*. The majority treats this as some sort of major event. This is plainly incorrect. Indeed, the court specifically noted in that footnote (as, also, had the Ninth Circuit panel in *Wade*) that even as early as *Wheeler* (which, of course, preceded the United States Supreme Court's *Batson* decision by eight years), *both* terms were used synonymously within a page of one another. (See *Wheeler, supra,* 22 Cal.3d at pp. 280-281; *Wade, supra,* 202 F.3d at p. 1196.)

The long and short of all this is that, the majority of this court and *Wade* to the contrary, our Supreme Court has been using the *Batson* standard all along, and footnote 7 in *Box* did not signal any change on that issue. Additional proof of that fact came in an opinion authored by Justice Mosk and filed a few days after *Box*. (*People v. Ayala* (2000) 24 Cal.4th 243, 260 [99 Cal.Rptr.2d 532, 6 P.3d 193].) As the majority points out in its footnote 3, in the course of that decision the court quoted from *Box* and, in so doing, put the term "reasonable inference" in brackets after the term "strong likelihood." I don't know how that court could have signaled more emphatically that, in its view, the two terms do now, and always have, meant the same thing.

The majority, however, is obviously not persuaded. Relying upon various and sundry dictionary definitions of the relevant terms and, even more

[8]The extended essay offered by the Ninth Circuit panel was unnecessary to its result because it ultimately affirmed the federal district court's denial of a petition for a writ of habeas corpus. That denial and affirmance brought to an end an attack on the Contra Costa Superior Court's handling of a *Wheeler* motion set forth in detail in our decision in *People v. Buckley* (1997) 53 Cal.App.4th 658 [61 Cal.Rptr.2d 860] (*Buckley*). In *Buckley*, with Presiding Justice Kline dissenting, we upheld the trial court's ruling that that appellant had not established a prima facie case that the prosecution's challenges were based on race. Our Supreme Court denied review in *Buckley* (see 53 Cal.App.4th at p. 683), and our opinion has been cited several times by other appellate courts dealing with appeals of *Wheeler* challenges. (See *People v. Walker* (1998) 64 Cal.App.4th 1062, 1069 [75 Cal.Rptr.2d 871]; *People v. Trevino* (1997) 55 Cal.App.4th 396, 409-410 [64 Cal.Rptr.2d 61] and *Birdine v. Hubbard* (N.D.Cal. Aug. 21, 2000, No. C 99-037 MJJ) 2000 WL 1229112, p. 3, the latter being a post-*Wade* denial of a petition for a writ of habeas corpus sought on *Batson* grounds.)

[9]Appellant's reply brief in *Box* was filed January 24, 2000.

importantly, repeated citations to federal, especially Ninth Circuit, authority, the majority contends, at least as I understand matters, that both the *Box* footnote and the bracketed phrase in *Ayala* are substantially inexplicable.[10]

I remind my colleagues in the majority that, their strong and honest feelings notwithstanding, we are an intermediate appellate court that is bound to follow the rulings of our Supreme Court, even those we feel are not adequately explained. Thus, and because I have no difficulty understanding the (admittedly cursory) *Box* footnote, I think the majority errs in not following its clear direction.

2. Most unfortunately in my view, the majority opinion gives only lip service to the principle that an appellate court should pay deference to a trial court's ruling on a *Wheeler/Batson* motion. The majority briefly alludes to this principle (maj. opn., *ante*, at pp. 328-329), but immediately thereafter proceeds to pay no deference whatsoever to the trial court's ruling.

And it is not as if the direction to pay such deference has been vague: our Supreme Court has repeated it practically every time a *Wheeler* issue has been before it—which is a lot of times. Indeed, in the important case of *People v. Johnson* (1989) 47 Cal.3d 1194, 1221 [255 Cal.Rptr. 569, 767 P.2d 1047] (*Johnson*), where the court disapproved of an earlier effort to modify the *Wheeler* standard (*People v. Trevino* (1985) 39 Cal.3d 667 [217 Cal.Rptr. 652, 704 P.2d 719]), the standard was articulated as one of "truly giving great deference" to the trial court. (*Johnson, supra,* 47 Cal.3d at p. 1221.) Most recently, in *People v. Jones* (1998) 17 Cal.4th 279, 294 [70 Cal.Rptr.2d 793, 949 P.2d 890], the court stressed that " ' " '[b]ecause *Wheeler* motions call upon trial judges' personal observations, we view their rulings with "considerable deference" on appeal.' " ' " To the same effect are the court's holdings in *People v. Howard* (1992) 1 Cal.4th 1132, 1155 [5 Cal.Rptr.2d 268, 824 P.2d 1315], *People v. Crittenden* (1994) 9 Cal.4th 83, 117 [36 Cal.Rptr.2d 474, 885 P.2d 887], and *People v. Mayfield* (1997) 14 Cal.4th 668, 723 [60 Cal.Rptr.2d 1, 928 P.2d 485]. Even the United States Supreme Court, in its *Batson* opinion, pointedly acknowledged this principle. It said: "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." (*Batson, supra,* 476 U.S. at p. 98, fn. 21 [106 S.Ct. at p. 1724].)

[10]The majority also contends that, previously, the court differentiated between the concepts of "strong likelihood" and "reasonable inference." It argues that in *People v. Sanders* (1990) 51 Cal.3d 471, 500-501 [273 Cal.Rptr. 537, 797 P.2d 561] (*Sanders*), the court expressed "the belief that a 'strong likelihood' of group bias requires greater evidence than a 'reasonable inference' of such bias . . . ." (Maj. opn., *ante*, at p. 327.) This is simply incorrect. The Supreme Court said no such thing and, indeed, the term "reasonable inference" nowhere appears in the cited pages of *Sanders*.

Our Supreme Court elaborated on this rationale for the required deference in *Sanders, supra,* 51 Cal.3d 471: "We reiterate that ruling on *Wheeler* motions ' "requires trial judges to make difficult and often close judgments. They are in a good position to make such determinations, however, on the basis of their knowledge of local conditions and of local prosecutors." [Citation.] They are also well situated to bring to bear on this question their powers of observation, their understanding of trial techniques, and their broad judicial experience. We are confident of their ability to distinguish a true case of group discrimination by peremptory challenges from a spurious claim . . . .' (*Wheeler, supra,* 22 Cal.3d at p. 281, quoting Kuhn, *Jury Discrimination: The Next Phase* (1968) 41 So.Cal.L.Rev. 235, 295, fn. 5; see also *Johnson, supra,* 47 Cal.3d at pp. 1219-1222.) Applying this standard of giving considerable deference to the determination of the trial court, 'we see no good reason to second-guess [the trial court's] factual determination' (*Johnson, supra,* at p. 1221) that the prosecutor was not motivated by bias against Hispanics." (*Sanders, supra,* 51 Cal.3d at p. 501.)

So, how much deference does the majority pay to this trial court's "powers of observation" which necessarily impact its "evaluation of credibility," its "understanding of trial techniques," or its "broad judicial experience"? The answer is disturbing: aside from a single mention of the word "deference" (maj. opn., *ante,* at p. 328), none at all. Thus, the majority (1) totally avoids the trial court's careful statement of its reasons for concluding that no prima facie case of discrimination was shown by the prosecution's peremptory challenge of Prospective Juror Ruby L. (maj. opn., *ante,* at p. 336, fn. 6) and (2) totally reevaluates, as if it were the trial court itself, the validity of that court's reasons for coming to the same conclusion regarding Prospective Juror Sara E. (maj. opn., *ante,* at pp. 334-336).

The apogee of the majority's second-guessing of the trial court regarding that potential juror concerns that court's verbal inquiry as to whether, in light of Sara E.'s ambiguous answer to a questionnaire inquiry, she could be fair and impartial. The majority says that the trial court "discount[ed] Ms. E.'s clarification of the ambiguity of her written answer by her oral statement to the court that she believed she could be fair and impartial." (Maj. opn., *ante,* at p. 335.) But it was *the trial court and not the majority* that saw and heard the answer from Ms. E. to its question and, therefore, *it is for that court and not us* to evaluate what weight, if any, to give to that answer. That is what the United States Supreme Court had in mind when it noted the ability of trial courts to "evaluat[e] . . . credibility" (*Batson, supra,* 476 U.S. at p. 98, fn. 21 [106 S.Ct. at p. 1724]) and what our Supreme Court meant when it observed that trial courts have necessarily unique " 'powers of observation.' " (*Sanders, supra,* 51 Cal.3d at p. 501, quoting *Wheeler, supra,* 22 Cal.3d at p. 281.)

3. Having substantially disregarded the principle of deference, the majority compounds its error by then indulging in a multitude of comparisons of the questionnaire answers of two of the three challenged jurors to those of prospective jurors of other races.

To its credit, the majority appreciates that it is navigating in, as far as California is concerned, uncharted water. It recognizes that appellant's challenge "rests in some measure [I would have said 'almost entirely'] on a comparison of the written and oral voir dire testimony of the African-Americans excused by the prosecution with that of other prospective jurors who were not excused, which appellant claims are materially indistinguishable. This requires us to consider whether and, if so, to what extent such comparisons may be used to show a prima facie case of group bias. Unfortunately, this is another area in which the application of *Wheeler* by the California courts has differed somewhat from federal judicial application of *Batson.*" (Maj. opn., *ante,* at p. 329.) The majority then goes on to indicate, once again, its clear preference for the federal approach, especially that espoused by the Ninth Circuit.

There is, the majority's implication to the contrary, nothing ambiguous about our Supreme Court's view of such comparative analyses. It has repeatedly admonished that such comparisons should not be undertaken by an appellate court. For example, in *People v. Turner* (1994) 8 Cal.4th 137 [32 Cal.Rptr.2d 762, 878 P.2d 521], in rejecting an appellant's challenge to a trial court finding of no prima facie case of discrimination, the Court said: "Defendant argues, however, that this basis was insufficient here because the prosecutor did not excuse other non-Black jurors who displayed similar intellectual limitations. However, we have previously rejected a procedure that places an 'undue emphasis on comparisons of the stated reasons for the challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor,' noting that such a comparison is one-sided and that it is not realistic to expect a trial judge to make such detailed comparisons midtrial. [Citation.] [¶] . . . Moreover, 'the very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror [who] on paper appears to be substantially similar.' " (*Id.* at pp. 169-170.) More recently, the court said precisely the same thing in *Box* (23 Cal.4th at p. 1190), also in the context of a prima facie ruling. (See also *People v. Fuentes* (1991) 54 Cal.3d 707, 715 [286 Cal.Rptr. 792, 818 P.2d 75].)

The majority tries to avoid this rule by three patently fallacious devices. First of all, it interprets the "undue emphasis" phrase in the quoted passage

from *Turner* as an invitation to put its foot in that door and try to open it further. In so doing, it carefully avoids discussing language in Supreme Court cases that make clear that the prohibition is *absolute*. Thus, in *People v. Montiel* (1993) 5 Cal.4th 877 [21 Cal.Rptr.2d 705, 855 P.2d 1277] (*Montiel*), the court stated: "If the trial court makes a 'sincere and reasoned effort' to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. *In such circumstances, an appellate court will not reassess good faith by conducting its own comparative juror analysis.* Such an approach would undermine the trial court's credibility determinations and would discount ' "the variety of [subjective] factors and considerations," ' including 'prospective jurors' body language or manner of answering questions,' which legitimately inform a trial lawyer's decision to exercise peremptory challenges." (*Id.* at p. 909, italics added.)

Quoting this passage, the court said even more recently: "Just as an appellate court *will not* compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. '[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparisons mid-trial.' [Citation.] Moreover, as we have indicated, such an analysis is largely beside the point, because it ignores the legitimate subjective concerns 'that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar [on the cold record].' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 136, fn. 16 [51 Cal.Rptr.2d 770, 913 P.2d 980] (*Arias*), italics added.)

I suggest that two recent doses of "will not" from our Supreme Court cannot, the majority to the contrary, translate into "may."[11]

Second, the majority argues that our Supreme Court's concern about comparative analyses obtains only in those cases where the prosecutor was either asked for or volunteered explanations concerning the questioned challenges, but does not apply in cases, such as this, where no such explanation was asked for or given. But there is absolutely no language in any of the cases cited by the majority even implying any such distinction. Indeed, several of the more recent cases containing the admonition against appellate courts engaging in comparative analyses were cases in which the trial court had ruled that no prima facie case had been established. (*Box, supra,* 23

[11]The majority carefully avoids discussing the "will not" language in *Montiel* and *Arias*, and doesn't even cite the latter case. It demonstrates its inattention (to be generous) to the language used in them by saying that "our Supreme Court has not precluded comparative analyses by reviewing courts but has simply declared that they should not place an '*undue emphasis*' on such an analysis." (Maj. opn., *ante*, p. 330; majority's italics.) The majority to the contrary, I think the phrase "will not" is a pretty good hint of an intent to "preclude."

Cal.4th at p. 1190; *People v. Turner, supra,* 8 Cal.4th at pp. 169-170.) Indeed, the only case relied upon by the majority where the admonition against comparative analyses *did not* arise in the context of a challenge regarding a prima facie case was *Johnson, supra,* 47 Cal.3d at page 1220.[12] This fact, plus the unequivocal statements in *Montiel* and *Arias*, combine to demolish the distinction so laboriously constructed by the majority.

Third, the majority suggests that perhaps our Supreme Court doesn't really mean what it says regarding comparative analyses because, in two decisions, the court itself indulged in comparisons. The majority is flatly wrong. The passage from *People v. Crittenden, supra,* 9 Cal.4th at page 119, which the majority contends reveals an inconsistency in the court's application of this rule (maj. opn., *ante*, at p. 330) does no such thing. As a simple reading of it demonstrates, the court was simply noting that Crittenden's "comparison" argument was not even worth debating because (1) all but one of the non-African American prospective jurors who expressed doubt about the death penalty were also excused by the prosecution and (2) the only one who wasn't was called "later in the proceedings, when the prosecutor's remaining challenges were few."[13]

The majority also suggests that a few sentences in *People v. Jones, supra,* 17 Cal.4th at page 295, demonstrate that the court endorses comparative analyses. (Maj. opn., *ante*, at p. 330.) It is, I believe, constructive to quote the two sentences the majority relies upon: "The implication [of the defendant's argument] is that the Black prospective jurors were singled out for special scrutiny. On this record, however, we are constrained to disagree. There is evidence to support the court's rulings on the four Black prospective jurors in question, enough to reject the defendant's claims of *Wheeler* error." (17 Cal.4th at p. 295.)

I simply do not understand how the majority can conclude from these three plain vanilla sentences that, contrary to its repeated and emphatic

[12]Both *Montiel* and *Arias* are unclear regarding the precise procedural context of their rulings. In *Montiel*, the trial court asked the prosecutor for his reasons without indicating one way or the other if it felt the defense had made a prima facie showing. (*Montiel, supra,* 5 Cal.4th at pp. 907-910.) However, the court hinted that, in such circumstances, it might infer a finding of a prima facie case (*id.* at p. 910, fn. 8). In *Arias*, there was no such inference because the trial court indicated it has "questions" about the defense's prima facie showing (indeed, the court itself had doubts if such had been shown); nonetheless, the prosecutor was asked for and gave his explanations. (*Arias, supra,* 13 Cal.4th at pp. 133-139.)

[13]In fact, in *Johnson, supra,* 47 Cal.3d at page 1220, the court specifically noted, by way of support for its anticomparison stance, that "the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge . . . ." *Crittenden*, in the passage quoted by the majority, was simply adopting this *additional reason for avoiding comparative analyses*.

words in many other decisions, our Supreme Court in fact approves of comparative analyses of the handling of prospective jurors. Since its emphatic disapproval of the comparative analysis system espoused (and indeed undertaken) by the majority in *People v. Trevino, supra,* 39 Cal.3d 667 (see *Johnson, supra,* 47 Cal.3d at pp. 1220-1221), our Supreme Court's position has been unwaveringly negative on that subject. I hope very much that the majority in this case is not suggesting that we should return to the *Trevino* era of wholesale appellate adjudication on this subject. That is, nonetheless, the effect of its opinion. For that reason, if no other, I strongly urge the Supreme Court to grant review of the majority's decision.

4. Finally, I submit that the record before us contains ample justification for the trial court's ruling that no prima facie case had been established. It will be recalled that the ultimate ruling by the trial court under review here was as to the second defense *Wheeler* motion. That motion encompassed the prosecutor's peremptory challenges to three African-American jurors, Ruby L., Sara E., and Clodette T. The trial court made specific comments on the record regarding the apparent justifications for the challenges to the first two, Ruby L. and Sara E. It made no specific comment regarding Clodette T.

The majority takes these three in reverse order. As far as Ruby L. is concerned, it seems to believe that the trial court's ruling regarding her is almost irrelevant. It buries its only reference to that ruling in a footnote 20 pages into its opinion (maj. opn., *ante,* at p. 336, fn. 6), even though appellant specifically made it a part of his appeal. The majority simply says that, as to this prospective juror, "the trial court seemed to believe [she] might be unable to fully understand the proceedings." (maj. opn., *ante,* at p. 336, fn. 6.) A slight understatement, I suggest; the trial court not only "seemed to believe" this, it clearly did and it was clearly right.

In addressing the challenge to this juror, which precipitated the second *Wheeler* motion, the trial court noted, among other things, that (1) "the Court had concerns with regard to her qualifications in this matter based upon her answers to the questionnaire," (2) Ruby L. had a sister who "had had drug charges," (3) "she herself felt that she had difficulty understanding things," and (4) her "answers on the questionnaire . . . would have justified a peremptory challenge by either side . . ."[14]

In short, Ruby L. was a hopeless prospective juror from the prosecution's standpoint, and the trial court was clearly correct in ruling that its challenge

[14]The trial court was obviously referring to Ruby L.'s answers to such questions as 37(c), 38-40, and 61. In these, she admitted that, e.g., she could not follow instructions to judge the credibility of all witnesses, including peace officers, by the same standards, could only commit to "try" to follow CALJIC No. 1.00 "regardless of the consequences," and was not sure that she could be fair, given the nature of the charges and circumstances of the case.

of her neither raised nor contributed to the raising of a prima facie *Wheel* issue. But the majority omits all this and, in so doing, does a grave injusti to the trial court. We are, after all, reviewing *the entirety* of its ruling on t *Wheeler/Batson* issue. Put another way, the issue before us is, was the tri court correct in finding, *as to these three African-American jurors,* that prima facie violation of *Wheeler* had been shown? But, apparently, becau the record as to one of those three so clearly supports the trial court's ruli and, conversely, undermines the majority's position, that portion is co signed to the near-oblivion of a footnote and, even there, half-hearted explained. I think this is quite inappropriate. Appellate courts regularly gi parties to appeals before them a hard time when they cite only the favorabl to-them parts of the record. We should pay a trial court at least the respect reciting the *full and complete basis* of its ruling before reversing it.

As to the remaining two prospective jurors, the majority paints with broad brush by proclaiming that "the record is bereft of any race-neutr explanation for these challenges." (Maj. opn., *ante,* at p. 336.) The majo ty's own opinion shows that this is utterly wrong; most of the preceding fo pages of its opinion are devoted to quarreling with the trial court over t proper weight to be placed upon and interpretation given to (1) Sara E failure to answer question 30 regarding whether either she or a fami member had ever been arrested, (2) the fact that one of her parents had, fact, been arrested for robbery, (3) her "don't know" answer to a writt question as to whether the fact that the case involved allegations of murd of a minor and child abuse would affect her ability to be fair and imparti

But the strongest basis for the peremptory challenge to Sara E. came fr her reluctant responses to the trial court's questioning of her regarding h failure to answer question 30 on the questionnaire. That revealing dialog went like this:

"THE COURT: . . . You or anybody close to you ever been arrested?

"Ms. E.: I can answer that.

"THE COURT: Was it you or someone else?

"Ms. E.: Someone else.

"THE COURT: How is that person related to you?

"Ms. E.: Parent.

"THE COURT: What was the person arrested for?

"Ms. E. I believe it was robbery.

"THE COURT: Was that in this county or someplace else?

"Ms. E.: Someplace else.

"THE COURT: And how long ago are we talking about?

"Ms. E.: Over thirty-five years ago."

In short, it took *six* questions from the trial court to elicit a full and complete answer to question 30 on the questionnaire. I respectfully suggest that, after that series of questions and answers, any prosecutor who opted to leave Sara E. "in the box" ought to consider a different career.

Also present in the record, although not cited by the trial court,[15] is the fact that Sara E. had had "legal training," clearly a "race-neutral" reason for rejecting a prospective juror. (See *People v. Crittenden, supra,* 9 Cal.4th at p. 119.) Additionally, and as noted by the majority, she stated in answer to one of the written questions that, although she would "not allow my emotions to get in the way of the verdict," she was "deeply saddened that [the victim in the case] was an eighteen month old child." I suggest that clearly there were more than ample reasons for the prosecution to peremptorily challenge Sara E. and that, by so doing, it did not raise a prima facie case of race discrimination.

Which leaves only Clodette T. As noted both above and by the majority, the trial court made no mention of its views regarding her in its ruling that no prima facie case had been shown. But a review of the record discloses, again as noted by the majority, that (1) she was childless (this case involved the death and alleged abuse of a minor),[16] (2) the police had made no arrest after the robbery of her home five or six years ago, and (3) she omitted to answer the two questions in the questionnaire dealing with her opinions of prosecuting and defending attorneys.

I submit that, giving the required deference to the trial court, it could reasonably have found that, considered together with the ample justifications

[15]We are, of course, permitted to review the record for "'grounds upon which the prosecutor might reasonably have challenged' the jurors in question." (*People v. Howard, supra,* 1 Cal.4th at p. 1155; see also our opinion in *Buckley, supra,* 53 Cal.App.4th at p. 667.)

[16]A Ninth Circuit case the majority omits from its encomiums to that court says that "lack of family may have appeared relevant to the prosecutor in a case involving child abuse and reasonably could be deemed to constitute a non-discriminatory basis for striking the venireman." (*U.S. v. Lewis* (9th Cir. 1988) 837 F.2d 415, 417, cert. den. *Lewis v. United States* (1988) 488 U.S. 923 [109 S.Ct. 304, 102 L.Ed.2d 323].)

in the record for the challenges to Ruby L. and Sara E., the challenge t Clodette T. did not, either alone or in combination with the others, present prima facie case of a violation of *Wheeler.*